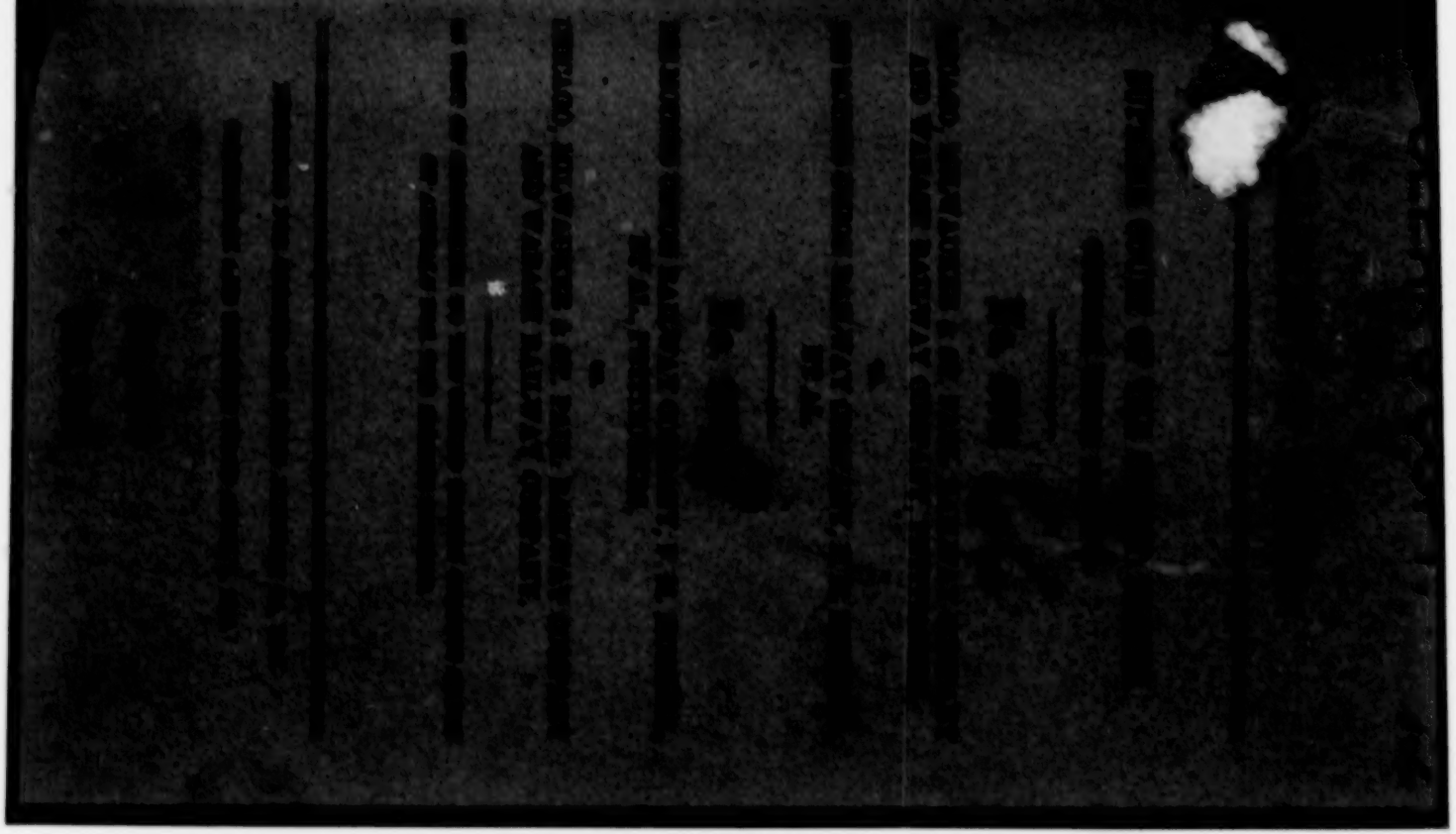

(26,905)

(26,906)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 278.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY, PETITIONERS,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL, ET AL.

No. 279.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL, ET AL., PETITIONERS,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

In the District Court of the United States, Southern District of Iowa, Central Division.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, and THE Wabash Railroad Company and The Wabash Railway Company, Complainants,

vs.

DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL, F. M. HUBBELL & SON, Defendants.

Stipulation.

The parties to this action, by their attorneys, acknowledge lodgement of the evidence in the clerk's office for inspection of the parties as required by law, and notice of time and place when the Court will be asked to approve the same, and, being unable to agree upon the condensation and stating of the evidence in narrative form, respectfully state to the Court that they desire and request that in making up the record of the testimony for the purpose of the appeal herein, it be reproduced in the exact words of the witness as given in the questions and answers upon the trial; and they further state that all the evidence was prepared and printed prior to the time that the present Federal equity rules went into effect, and with a view of using the evidence so printed in the Court of Appeals in the event that an appeal was taken by either party; that the documentary evidence herein constitutes a very large part of the entire testimony, there being more than 750 exhibits introduced and used upon the trial, all of which seem necessary on appeal, and that the oral testimony is practically all in explanation of the negotiations leading up to and culminating in the making of such documents and in the interpretation of the same, and it is necessary, in the opinion of the respective parties, to have such testimony reproduced in the exact language of the witness in order that the said exhibits may be fully understood; and they request that the evidence attached hereto, consisting of one volume designated as Testimony For Complainants, with index, and consisting of 617 pages in addition to the index, one volume designated as Defendants' Testimony, consisting of 360 pages with index, and one volume designated as Exhibits, and Defendants' Testimony consisting of 761 pages of defendants' exhibits and index, all attached hereto, be approved and certified by this Court.

and that the Clerk be directed to file the same in his office as a part of the record for the purposes of the appeal in this cause.

J. L. MINNIS AND
J. C. COOK,
J. N. HUGHES,
Attorneys for Complainants.

PARKER, PARRISH & MILLER,
F. W. LEHMAN,
Attorneys for Defendants.

Endorsed: Filed October 18, 1916. Wm. C. McArthur, Clerk.

In the District Court of the United States, Southern District of Iowa, Central Division.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, and The Wabash Railroad Company and The Wabash Railway Company, Complainants,

VS.

DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL, F. M. HUBBELL & SON, Defendants.

Certificate.

Now, to-wit, this 18th day of October, 1916, the undersigned Judge of the District Court of the United States for the Southern District of Iowa, having examined the evidence prepared by the parties as the evidence to be included in the record on the appeal of this cause, and the Stipulation of the parties with reference to notice and hearing, and also the request of the parties that certain parts of the testimony be reproduced in the exact words of the witnesses, and, it being the judgment of the Court that the evidence should be reproduced in the exact language of the witnesses, it is hereby ordered that the foregoing and attached evidence, consisting of one volume designated as Testimony for Complainants, with index, consisting of 617 pages, one volume designated as Defendants' Testimony, with index consisting of 366 pages, and one volume of exhibits designated as Defendants' Testimony, consisting of 761 pages, be and the same is hereby approved as the testimony in this cause to become a part of the record for the purposes of the appeal herein; and it is hereby directed and ordered that the same be filed in the clerk's office by the

clerk, and be made of record herein, and is hereby made a part of the record in this cause.

(Sgd.) MARTIN J. WADE,
Judge of the U. S. District Court
for the Southern District of Iowa.

Endorsed: Filed October 18, 1916. Wm. C. McArthur, Clerk.

* * * * * * *

(Here follow the Depositions of certain Witnesses which are omitted at this point to avoid duplication, the same appearing at marginal page 879, et seq.)

(*Record Entry of Hearing February* 11, 1913.)

Judge McPherson.

On this day this cause came on for submission to the Court on the evidence and arguments of counsel, the complainant Chicago, Milwaukee & St. Paul Railway Company, appearing by J. C. Cook, its solicitor, the complainant Wabash Railroad Company appearing by Wells H. Blodgett and J. L. Minnis, its solicitors and the Respondents, The Des Moines Union Railway Company, et al. appearing by N. T. Guernsey and J. L. Parrish their solicitors, and the matter not having been concluded when the hour for adjournment arrived, it is ordered that court do now adjourn until tomorrow morning at nine o'clock.

(*Record Entry of Hearing, February* 12, 1913.)

Before Judge McPherson.

Hon. Smith McPherson, Judge.

On this day this cause came on for further hearing, the parties appearing as heretofore and the matters in controversy not having been concluded when the hour for adjournment arrived, it is ordered that court do now adjourn until tomorrow morning at nine o'clock.

(*Record Entry of Hearing, February* 13, 1913.)

Before Judge McPherson.

On this day this cause came on for further hearing, the parties appearing as heretofore and the matters in controversy not having been concluded when the hour for adjournment arrived, it is ordered that court do now adjourn until tomorrow morning at nine o'clock.

(*Record Entry of Hearing, February* 14, 1913.)

Before Judge McPherson.

On this day this cause came on for further hearing, the parties appearing as heretofore and the matters in controversy not having been concluded when the hour for adjournment arrived it is ordered that court do now adjourn until tomorrow morning at nine o'clock.

(*Record Entry of Hearing and Order of Submission, February* 15, 1913.)

Before Judge McPherson.

This case has been duly and fully argued by counsel on the record, evidence, oral testimony and exhibits, having been argued on February 11, 12, 13, 14 and on this day the arguments were concluded. The case is now fully submitted and by the court taken under advisement.

Heretofore there was a case tried in the District Court of the State of Iowa in and for Polk County in which the Chicago, Milwaukee & St. Paul Railway Company was the plaintiff and the Des Moines Union Railway Company was the defendant, resulting in a decree for the defendant, dated March 29, 1910, in which the said plaintiff therein took an appeal to the Supreme Court of Iowa, and to which said Supreme Court of Iowa the case has been heretofore fully submitted, but not yet decided by said Supreme Court. After the said Supreme Court fully determines said case, the issues in this case are to then be completed, and the parties reserv*ing* the right to introduce testimony with reference to that issue of estoppel by judgment. Thereupon the case is to be regarded as finally submitted.

(*Memorandum Opinion of the District Court. Filed February* 24, 1916.)

By Judge Wade.

Any attempt to review the thousands of pages of evidence, briefs and arguments in this case, would be impossible. I can only say that I have not only read the evidence, briefs and arguments, but I have studied them with care and deliberation. I have given effect to every consideration which aids the human mind in searching for the truth. I have, in an effort to determine the intention of the parties in their words and acts, throughout more than thirty years of transactions before the court, considered the motives which ordinarily actuate men in dealing with property rights. Throughout this tangled web of inconsistent, and often incomprehensible conduct, relating to the

property and rights in issue, I have tried to trac*t* the purpose and the intent which men would naturally have in dealing with their fellows under such circumstances.

I have considered the relation of these men, one to another, I have asked myself, what were the probabilities as to *c*ntent and purpose, I have tried through the fog, to discern here and there a meaning of the minds of the men dealing with these important property rights. I have borne in mind, that agreements may be discovered, not alon*g* in words used, but in acts and *dundu* conduct. I have tried to apply the well recognized principle, that contracts may often be best construed, by considering the construction which has been placed upon them by the parties themselves, as manifest in their acts and conduct.

I have given recognition to the force of acquiescence in conduct, to delay in assertion of rights—to failure to protect—to apparently silent recognition of asserted privileges. Of course it is impossible to reconcile all that has been done, it would be utterly impossible to understand why many things were done, except that i*s* is manifest, (1), that during a large period of time involved, men representing conflicting interests, were personal friends, exhibiting great confidence in those with whom they were dealing; (2), The men whose acts are under consideration, were men of great responsibility to other varied interest, and (3) *muh* Much of what appears now to be valuable interest, during a large portion of the time involved, were considered of slight pecuniary value, and treated accordingly.

It is apparent, of course, that if at the time of the transactions during the first ten years, all the parties realized that the Terminal Company would eventually attain a value which it now possesses, the transactions between the parties would have been more definite and certain.

Things were permitted to "Drift" largely because it was not felt that beyond immediate benefits which the different parties were receiving, there appeared to be anything of sufficient value to justify positive assertion of rights between the parties.

But in considering all of the foregoing, I have recognized the well settle- principles that,

(*a*) Men must be bound by their contracts even though subsequent events proved that they were inadvisable, or absurd;

(*b*) That rights and titles evidenced by written contracts, records, or deeds, cannot be set aside or affected by parole evidence tending to change the terms and effect of such contracts, records or deeds.

(*c*) That men are presumed to intend the natural consequence of their acts.

From the record in this case, in view of the foregoing considerations, certain conclusions have been forced upon me, I will not undertake to recit- in detail, the evidence forming the basis or these conclusions; I will only indicate something of the processes leading to these conclusions.

In what follows, I will refer to the defendants as "The Terminal Company", and to the plaintiffs and their predecessors as "The Railway Companies".

The facts seem to group themselves, at least for convenient purpose, with reference to periods of time, 1880 to 1885 inclusive. During this period we find the relations of the parties established by the contract of December 8, 1880, by which Polk, Clarkson, Hubbell and Rummells, and the Wabash Railway became associated in a plan to construct certain railways from Des Moines to Albia, and Des Moines to the Northwest in connection with other already constructed lines.

Pursuant to this contract we find the organization of the necessary companies to carry out the plans of the original contract. These lines converging in Des Moines, and Des Moines being a center of population and business, the parties naturally proceeded to acquire terminal facilities in that city, purchasing property—much of it in the names of James F. Howe and G. M. Dodge, who held it as trustees; the money paid therefor, being expended by the Wabash.

On January 2nd, 1882, was executed the contract which is and has been, the bone of contention" in this whole matter; at least all inquiries in regard to rights and titles, logically go back to this contract. While uncertain and indefinite in some degree, and tentative only in many respects, did have the effect of determining as between the parties, definitely and conclusively certain rights. All of the property purchased up to that time by this contract, became by reason of the terms thereof, dedicated to the future use and enjoyment of the three companies named therein. It was as comprehensive as the con-

ditions would at that time warrant. It clearly indicates the relative interests of the different parties—not any definite interests in any particular piece of property but an apparent definite purpose that each company should have such interest in the total property, as would serve its uses for terminal purposes, and this was the only interest any of said companies naturally desired in the properties.

For such purposes, each company was the owner of the entire property, subject only to the rights of the other companies for similar purposes. It apparently was not intended to reserve to any of the companies, a specific interest in the entire property, but considered more the rights of use which the respective parties would have in the property; but there can be no question but that the entire property was dedicated to the joint use of all. The conditions of such joint use also were specified in fixing the proportion of expenses to be borne by each of the companies. The contract specifically provided that the title to the property "should be and remain in a Trustee". It also provided "That a Depot Company may be organized, and may take permanent charge of the property upon the terms herein set forth" and it provided that bonds might be issued covering the "respective portions of the costs of said properties and improvements."

The provision that the property "shall be and remain in a Trustee", was apparently intended to be read with the provision "that a Depot Company may be organized, and may take permanent charge of the property upon the terms herein set forth, and "that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the costs". It was hardly intended that in case a depot company should be organized, that the title was to remain in a separate trustee and the management in the depot company, because it expressly provides, that the depot company should issue "its mortgage bonds", which could not well be done without holding the title; so that it may be fairly inferred that it was intended that in case a depot company would be organized, that it would take the title. In any event, the subsequent conduct of the parties construing this provision, conclusively established that the depot company was to be to all intents and purposes the "Trustee" referred to in the contract. No one can successfully contend, that when this contract was made, the details had been worked out, or that there was a meeting of the minds of the parties upon such details. Much was left to mutual cooperation in the accomplishment of the general purpose, and recognizing that

there might be disagreement, provision was made in the contract for arbitration.

If the transactions stopped with the execution of this contract, there could be no question between the parties to the contract as to their rights in the property. It was property held for their joint use for terminal purposes. It is idle to talk of consideration, or lack of consideration, in this transaction. The consideration was satisfactory to the parties at that time. The mutual obligations which then existed, and the mutual advantages in anticipation, cannot of course now be fully disclosed; but a consideration which is valuable and satisfactory to the parties, cannot, as between the parties, be inquired into by the Court.

From the execution of this contract until December 9, 1884, nothing of interest in this case occurred—the parties apparently dealing in harmony under the provisions of their contract. On this date, however, it was decided to form a corporation—the purpose being expressed in the language, "Whereas it is desirable that a corporation be organized *by* the purpose *of* taking and holding such property" The words "such property" referring specifically to the property covered by the contract in 1882.

On December 10, 1884, the corporation was organized. Articles of Incorporation were adopted, which went far beyond the usual forms, in an effort to specifically describe the purpose of the corporation as being "for carrying out the objects and purposes of the agreement heretofore, to-wit, on the second day of January, 1882, made and entered into." The contract is set out in full in the Articles of Incorporation, and a construction is placed upon the contract in the following language:

"Whereas, it was provided in the contract aforesaid, that a Depot Company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate, and maintain said property in such manner as best to serve the interests of the parties hereto."

The nature of the business was described as "the construction, ownership, and operation of a railway in, around and about the city of Des Moines, Iowa," including the construction ownership and use of depots, freight-houses, railway shops, repair shops, stock yards, and whatever else may be useful and convenient for the operation of railways at the terminal points of Des Moines, Iowa, etc."

It will be observed that the company was not organized merely to hold the property then owned jointly by the parties under the contract in 1882, but it contemplated the purchase of new property, the construction of improvements thereon, the extension of facilities for terminal uses. In other words, it is apparent that in the organization of this corporation, the parties had a vision of a large, comprehensive Terminal Station, equipped with the necessary tracks, not only to accommodate the business of the three Companies, but looking forward to the extension of privileges to other Companies, it was to be a close corporation which carefully guarded the rights of the three Railway Companies, and gave them absolute control.

The capital stock was designated as One Million Dollars, and authority was given for the issue of such capital stock for the "property and franchises in the city of Des Moines" held by the Railway Companies.

The formation of this corporation and its plan of ownership and operation, was satisfied by Resolutions adopted January 1, 1885 by the different railway companies interested, which expressed the purpose of conveying to the corporation, the property held in behalf of the three companies under the contract of 1882, whether held by the railway, of the Trustees, Howe and Dodge. Much consideration has been given to the wording of these Resolutions, but two purposes are clearly expressed, (1) a recognition of the organization of the corporation as being the "Depot Company" which the contract of 1882 provided might be organized, and (2), that all property in which the Companies had a joint interest under the contract of 1882, whether held by the Companies or others, should be transferred to the corporation.

On January 1st, 1885, the Terminal Company also by resolution, "accepted the transfer and management and operation of said property", and expressed a purpose to assume control thereof from that date "so far as practical". The Resolution of the Terminal Company specifically refers to the contract of 1882, and gives recognition to the fact that the corporation was organized in pursuance of said contract, and specifically recognizes the desire of the Companies, "to transfer said property to this Company in accordance with the terms of said contract."

It was further provided for a committee to confer with the parties "upon the terms and prices at which they will respectively assign, transfer and convey said railroad property and franchises to this

Company, and procure from them and each of them such conveyance and transfer as may be necessary To Fully Invest This Company with the Title, Control and Management of said Properties Provided for in said Contract of January 2nd, 1882."

Up to this time, the management of the property under the contract of 1882, had been in the Des Moines & St. St. Louis Railroad Company, that this management in fact continued until 1888, notwithstanding the organization of the corporation and resolutions aforesaid. In fact everything seemed to remain in statu quo from January, 1885 until 1887.

In November, 1887, appropriate resolutions were adopted by the Railway Companies, directing Howe and Dodge to transfer the property held by them as Trustee-, to the Terminal Company. These resolutions clearly gave recognition to the contract of 1882, and to the conveyance directed as being pursuant to said contract. The Resolutions provided for certain issues of stock, which were not made in accordance therewith; the issuance of stock having been deferred apparently by mutual acquiescence until 1890.

In 1887, appropriate conveyance- were made by Howe and Dodge; the deeds from Howe reciting that the title was held under the contract of 1882, and the deed from Dodge being a simple quit claim.

November 7, 1887, the St. Louis, Des Moines & Northern, executed a quit claim deed to the Terminal Company. November 8, 1887, the Des Moines & St. Louis Company adopted a Resolution directing its proper officers to convey to the Terminal Company "for the purpose of carrying out the contract of date January 2nd 1882" and on February 21, 1888, said Company complied with said Resolution by the execution of a warranty deed.

Thus by February 21, 1888, the Terminal Company had become invested with the title to all the property covered by the contract of 1882, whether held by Howe, Dodge, or the Railway Companies. Much significence is attached to the expressions in these deeds, which conveyed upon their fact, an absolute title. These deeds must be con-trued with the Resolutions, authorizing their execution, even so construed, there is no question in my mind but what the Terminal Company acquired absolute title to these properties.

I have given to the claims of the plaintiff most earnest consideration, but I cannot agree that the Terminal Company acquired any

of this property as "Trustee" in the ordinary sense of that term. The title of the Terminal Company was, and is, an absolute title. the rights, if any, of the plaintiffs, must be looked for, not in a reservation of any title in the property, but whatever they are, they consist of rights or equities in the corporation itself. I cannot believe that it was contemplated by any one, that the title to be acquired by the Terminal Company, was less than an absolute title.

But we must not overlook the purpose for which the corporation was created, and the use to which its property was to be put. There is nothing to indicate that this corporation was intended in any sense as a temporary agency; it has all the marks of permanency. It was not contemplated that any of the parties should ever against acquire right of title in the properties conveyed, nor was there any reservation in the conveyance. They were absolute, and their effect cannot be varied by parole evidence of a reserved intent or purpose.

So that the rights of the plaintiff must be looked for, not in a reservation of title to the property conveyed, but in they right which these parties would have in the use of the franchises of the corporation itself.

Looking at the transactions to this date, I cannot believe that it was the purpose of these railway- to grant unto the Terminal Company, the absolute interest which they had in these franchises which were necessary to the business of the Companies without reserving any right whatsoever (except at the will of the Terminal Company) to the use of its facilities. I do not believe that it was in contemplation of the parties, that the Terminal Company might, the day after these conveyances were completed, by Resolution, terminate the use of the Terminal Railways by these companies.

Much has been said about the plan for the issuance of stock as being payment in full consideration for all interest. It is apparent that at this time, and for several years afterward, the matter of the issuance of stock was regarded as of small import. No stock was issued until April 28, 1890—more than two years after the completed conveyances to the Terminal Company. During these two years, what were the rights of the Railway Companies? They continued to use the Terminals. No contract was made, were they trespassers, technically speaking. The rights of the parties during this period, as subsequently, must be ascertained in part by the test of reason and probabilities, and we must in this connection, also bear in mind the rule contended for by the plaintiffs, they except under rare con-

ditions, can a Railway Company divest itself absolutely of a portion of its railway necessary to its successful operation.

What were the rights of these railway companies reserved out of these transactions? March 31, 1888, we find a Resolution by the Terminal Company fixing the manner in which the expenses should be paid, which was substantially the same as the plan followed when the Des Moines & St. Louis Company was handling the Terminals. Interest on bonds was provided for substantially in the same ratio as other expenses, and it was expressly resolved "that a supplemental agreement be made."

fixing the terms and conditions on which the several lines Now Interested, or which may hereafter become interested, shall enjoy the use of these terminals. "Supplemental" to what? The only thing that such an agreement could be supplemental to, would be the contract of 1882, as incorporated in the Articles of Incorporation.

In construing the effect of the contract executed under this Resolution, which defendants contend is a lease, it is important to bear in mind that transaction between the parties in this case, have now reached a point where they not only were dealing between themselves in a friendly way, but *were* they had to deal with the public in reference to the bonds which were issued to pay for investment. The time has come when, mutual confidence, which perhaps accounts for the uncertainty of much that was done before, will no longer serve. Forms must now be observed. Now and hereafter, proceedings must be expressed in such a way as to show that things are upon a "business basis." These consideration- may account for terms of "grant" in the contract finally executed May 10, 1889. This contract, regardless of specific terms employed, was clearly intended to merely fix the relations of the parties with reference to the enjoyment of the property during the period of the contract, and the period of the contract was clearly fixed with reference to the maturity of the bonds.

I find nothing in the acts or conduct of the parties at this time or prior thereto, which indicates upon the one hand, an intention to waive any right to the use of the property conveyed to the Terminal Company; or upon the other, an assertion by the Terminal Company, of any right to a denial of such use. Being satisfied that it was not intended to be a "grant" for the periode of thirty years, it cannot be construed as a perpetual grant. I can only construe it as a defi-

nite determination of the obligations of the Terminal Company and the Railway Companies for a fixed period of time.

This contract of 1889 being the last important fact in the transactions preceding the amendment to the Articles of Incorporation in 1890, it is well to determine the relative rights of the parties at any — prior to the date when said Articles were amended.

When I go back to the beginning of the relations of the parties originally interested in the property, I find that the dominant a*le*ment manifest is the joint use of the property. Profits were no considered, except as they might be incidental. The contract of 1882 was really a contract of joint use of certain properties. We must always bear in mind the situation of the three companies, each of which absolutely required the use of the properties for the proper performance of their corporate duties. This right to use, not only valuable, but essential, must have been in the mind of all parties at the time of organization of the Terminal Company, and after its organization, I cannot believe that these Companies had deprived themselves of the right to this use. This right is in no manner a limitation upon the ownership of the property it is merely an equity which the Companies reserved in the corporation itself—an obligation which the corporation assumed by virtue of its positive recognition of the contract of 1882, and by virtue of the numerous expressions in Resolutions and conveyances by which it acquired title to the property.

This right—this equity, was of cour*t* subject to terms and conditions which might change with the years.

Under the contract of 1882, it was contemplated that each Company should bear a fair share of the expenses, but what would be a fair share, might change with changing conditions. The right or equity which was reserved to these Companies upon the formation of the Terminal Company, was subject to the same conditions and obligations, and the contract of 1889, recognizing these mutual obligations, was merely a determination for the period there expressed (the limit being fixed by the maturing bonds), of the amounts which the Companies should pay for enjoying the equity, which I hold they had in the use of Terminal properties. I do not believe, that if a disagreement had arisen at the time of the execution of the contract of 1889, and if the Terminal Company had denied the Companies the use of the property, that any court would have sustained the right asserted by the Terminal Company. I do not believe that any court

would have given recognition to a condition where three lines of railway, exercising franchises granted by the State, would terminate at the entrance to the city of Des Moines. I believe that an assertion of this kind by the Terminal Company, would have been held not only contrary to equity and good conscience, under all the circumstances, but that it would have been held contrary to public policy to permit the Terminal Company to thus "chop off" three important lines of railway so as to render them practically useless.

This conclusion has support in the reports, 1891, 1892, 1893, made by the Terminal Company to the Executive Counsel of the State, in which under oath, it was represented, that "the Des Moines Union Railway Company is simply a representative Company, acting as an agent at Des Moines for the Wabash Railway Company and the Des Moines & Northwestern Railway Company and the Des Moines and Northern Railway Company, performing all necessary work for them, and charging each at actual cost its due proportion for the expense thereby incurred."

Thus for four years after the contract of 1889, it appears that the general view of the Terminal Company, was at least consistent with the continuing rights of the Railway Companies.

Counsel for plaintiffs give too much significance to the term "agency" used in these reports, as indicating a mere agent or employe. I do not so construe the term. I think the word is used as meaning the "medium" through which these Companies exercised the right of use, which always up to this time was their dominant interest in the property.

Counsel for defendants have laid great stress upon the use of the term "tenants" in contracts and resolutions, and correspondence, descriptive of the Railway Companies. Equity does not consider forms or terms; it tries to look behind the words used, and to shape decrees based upon truth and justice, as the same may be manifest, not in single terms but in all the words used, and all the acts done expressive of purpose and intent; And I might as well say at this point, that the right or equity of the Railway Companies to the use of the Terminal porperties, in my judgment, is perpetual during the existence of the corporation. I find nothing in the proceedings subsequent to the contract of 1889, to signify a purpose or intent to release such equity or right, and find nothing which justifies the Terminal Company in assuming that such equity or right was forfeited or waived.

But What Of The Amendment To The Article Of Incorporation in 1890? Technically, the amendment was not valid, because at that time no stock of the corporation had been issued, and of course a valid amendment could only be adopted by the stockholders. Counsel for plaintiff insist that unless actually valid at the time the amendment was voted upon, that the amendment never could become affective by any process of ratification, estoppel, waiver, or acquiescence. I can agree with this proposition in so far as the rights of the public might be affected by such amendment, but in so far as property rights and relations are concerned as between individuals, I cannot agree that by subsequent conduct, the things attempted to be done could not become binding upon them. In so far as the right or equity of the Companies which I have found existed at that time, is concerned, I do not believe that it was in any manner affected by the amendment. It does not appear that it was intended to affect any right then existing, and even if such intention existed on the part of any one, it was not manifest, and I find nothing which would give it effect.

But this amendment to the Articles did fix the capital stock, and did provide for the issuance of "four thousand sharez" "as part of the purchase price of the terminal property" and these shares were actually issued, and are still outstanding. A large number of these shares have been sold—not to innocent purchasers without knowledge of the proceedings, but sold for a consideration. Some are still held by the Companies receiving the original issue, or their successors. For more than twenty-five years now all parties have treated with each other with full recognition of the issuance of this stock authorized by the amendment to the Articles of Incorporation, and certainly it is too late now to question the proceedings under which said stock was issued.

The only other contract between the parties is what is termed the Ratification Contract of 1897 which was adopted after a fruitless effort to agree upon terms which would modify the conditions of the contract of 1889 as to the amount which the Companies should pay.

Here again we find that the necessity for a new contract was based upon the claim that "without it we could not well dispose of our bonds," and the correspondence relating to this attempt to procure a new contract with new terms, and the final adoption of the ratification contract, must all be construed with this point in view; so construed, many of the expression there, which counsel would argue for or against, right or title, become ineffectual for such purpose.

"The Surplus Earnings."

And this brings us to the question of "surplus earnings" which consisted of charges for switching and handling cars and traffic for other Companies than the Railway Companies, and building rentals and privileges.

To whom does this accumulated "surplus" belong? Here again we are required to view things from the beginning, and to deal with conditions which at the beginning, no one anticipated. It is often true, in dealing with human affairs, that courts are compelled, so to speak, to make contracts between parties in reference, to certain property rights which would accrue to them out of conditions not contemplated by either party at the time of original transactions.

In the original transactions between all these parties, there were two things in which the Companies could possibly be interested; (a) the use of the Terminal properties, and (b), the profits which might be produced by the use of the Terminal properties by other persons. It is apparent that no one anticipated profits as a matter of any great consequence at that time. It is evident that the contract of 1882, contemplated the application of any possible profits to the reduction of the expense account, to the advantage of the Companies. When it came to executing the contract of 1889, in fixing the amounts to be paid by the Railway Companies, specific language was used which required only a deduction from the total expenses "the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month."

At that time the depot facilities did not exist. It is not apparent that switching charges were by virtue of contracts for the use of said property. In other words, technically speaking, the contract limits the application of receipts to the amounts received from other Companies using the terminal properties under contracts or leases. For the first year, the Terminal Company seemed to construe the contract as requiring the application of rents collected for the use of real estate and for switching charges, and this was ordered by Resolution of February 11, 1891.

January 7, 1892, a Resolution was adopted, reciting the need of cash capital, and ordering that the rent of real estate and switching charges, "shall not be credited upon the accounts of the tenant companies," "until the further action of the board." This led to an inquiry, and on March 2nd, 1892, the Superintendent of the Term-

inal Company, wrote the Auditor of the Wabash, that the allowance for switching charges, rentals, etc. would not be distributed until the Company could accumulate a small sum for working capital, and while there was correspondence and some controversy, thereafter, this "surplus fund" has never since been credited upon the bills of the Railway Companies.

Did this point rest upon the contract alone [ther] would be force in the claim that it was the intention that all income from every source should be deducted from the expenses to be paid by the Railway Companies. Here we come to deal with conditions that no one anticipated. The business of the Company which at that time made the surplus fund very small, increased under careful management, until it has assumed very large proportions.

And here another factor must be considered. When the Terminal Company was organized, it provided for the issuance of shares of stock. Under the amendment to the Articles, the amount of shares actually issued, was four hundred thousand dollars. These shares nominally, were issued in part payment for the properties. They in fact, represented little, if anything in value, because bonds were issued nominally in an amount sufficient to pay for all money invested; but in [an] much as these bonds, at the time of issuance, probably could not be said to be worth par, the stock may have been considered as making up the difference between actual value and selling value at that time. In any event, the stock was issued. It will not do to say that it meant nothing. It will not do to say that it never was intended that they should have any dividends. Shares of stock are written contracts. They do not express all of the rights and obligations of the parties, but the law attaches to them specific rights, and to the corporation, specific obligations, and the legal effect of these shares of stock, cannot be changed by parole evidence.

A court is not justified in believing—certainly not in the absence of specific record evidence, that it was the intention these shares of stock should be issued and held without hope or expectation of a dividend thereon; but there was no source of dividend for the stock, if, as contended by plaintiffs, all of the rentals and switching charges were to be credited to the Railway Companies.

I feel that the only construction which the court is justified in placing upon the entire transaction is, that it was contemplated that there would be some profits, and that the profits should go to the Railway Companies in the proportion indicated by the division of the stock. In other words, if the Companies receiving the stock, had held the stock until the present time, there need be no dispute over switching charges, or rentals, or other surplus, because it would all go to these Companies as dividends upon their stock. It isn't clear that this was the actual present intent, but it is the only intent which a court can give to the acts and conduct of the parties in view of the issuance and division of the stock.

If it were possible that the Terminal Company would have an income aside from rentals, switching charges, etc., which might form the basis of a fund for paying dividents, there would be more reason for urging that the contract of 1889, should be construed as contemplating the application of this "surplus fund" to their account; but at least from everything in view at the time of these transactions, such a construction of the contract of 1889, would leave the Company without any fund whatsoever, and the stock representing nothing except the power to vote.

There is nothing in the facts which would enable a court of equity to enter a decree providing for an application of a portion of this "surplus fund" to the Railway Companies, and a portion to the stock. Either the stock must fail to receive any dividend, or the Companies must be deprived of the application of any part of the "surplus fund". The court cannot shut its eyes to the fact apparent in the record, that those who purchased the stock, and who have had the management of the Company, are, to a large extent, responsible for its wonderful development, and while it might be possible to pay for the service they have rendered, yet upon the whole record, I do not feel that the court is justified in now entering a decree which proclaims the stock from the beginning, as signifying nothing of value; such a decree would only be justifiable where the evidence was clear, convincing and satisfactory.

I will not review the criticism of the respective parties, nor the charges of bad faith. It is apparent of course, that Hubbell early anticipated the possibilities of the development of this Terminal Company, and that with greater foresight than the other interested persons, he purchased the stock for small consideration; but certainly so far as the present Companies are concerned, the stock was purchased openly—part of it, directly from the Wabash, or the purchasing committee, and part of it from the predecessor of the Milwaukee Road, and the rights of the Milwaukee Road were ac-

quired with full knowledge of the ownership of the stock. These Companies still hold part of the stock, and under my construction, they will receive their proportionate share of the accumulated profits of the Terminal Company. While the amount paid for the stock by the present holders, was small, the railway companies should not be allowed to say that the sale by their predecessors of this stock, was a sale of something which had absolutely no value, and that never could have any value. Somewhere, and somehow, it is my judgment, that all parties believed that this stock should earn some dividend provided the Company succeeded, but there is no such possibility upon the construction now contended for by plaintiffs herein.

The contract of 1889 will terminate in 1918. Under my holding the plaintiffs are entitled to a continued use of the Terminal properties. What shall be the terms or condition of such use, cannot now be determined. There being no contract governing the amount to be paid, if the parties cannot agree, a court of equity will have to determine the matter for the parties. The contract of 1889 may be a guide, or it may not be a guide; it will depend altogether upon what the court may feel, in view of all the facts, is equitable and just.

In the foregoing I have not quoted authorities. The principles applied are fundamental and well recognized. It has been merely a process of interpretation, not alone of one contract, but different contracts and numerous acts and transactions.

In the recent case of Rushing vs. Manhattan Life Insurance Co. — Fed. Rep. — Sanborn, Judge, well says,—

"The sole purpose of the interpretation of a contract is to ascertain the intention of the parties when they made it. If possible every part of a contract must be so construed as to be consistent with every other part and to have effect. It is only when the parts of a contract are so radically repugnant that there is no rational construction that will render them effective and accordant that any part must perish. And the intention of the parties must be deducted, not from specific provisions or fragmentary parts of the agreement, but from the entire contract, because the intent is not evidenced by any part or stipulation of it, nor by the contract without any part or provision, but by every part and term so construed, if possible, as to be consistent with every other party and with the entire agreement. American Bonding

Co. vs. Pueblo Inv. Co., 150 Fed. 17, 27, 80 C. C. A. 97, 107; Jacobs vs. Spalding, 71 Wis. 177. 188, 36 N. W. 608; Boardman vs. Reed, 6 Pet. 328 Canal Co. vs. Hill, 15 Wall, 94; O'Brien vs. Miller, 168 U. S. 287; Pressed Steel Car Co. vs. Eastern Ry. Co. 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc. Co. vs. Ajax Gold Min. Co. 141 Fed. 563, 73 C. C. A. 35; U. S. Fidelity & G. Co. vs. Board of Com'rs, 145 Fed. 144, 148, 76 C. C. A. 114, 118."

Not only is the foregoing true as to the interpretation of a contract, but it is true as to the interpretation of a series of acts and contracts.

I cannot forbear expressing my appreciation to counsel for their earnest and laborious efforts in presenting this case. In the application of the legal principles involved, I have been greatly aided by the numerous authorities cited and discussed, and by the able and eloquent arguments presented in open court.

Counsel for plaintiffs will prepare a decree consistent with this Opinion reserving proper exceptions and submit the same to counsel for defendants, who will have twenty days in which to file objections to the form thereof, and it can then be submitted for determination.

(Sgd.) MARTIN J. WADE,
Judge.

Endorsed: Filed February 24, 1916. Wm. C. McArthur, Clerk.

Petition of Wabash Railway Company for Leave to File Original Bill of Complaint in the Nature of a Supplemental Bill.

Comes now the Wabash Railway Company, a railroad corporation created by and under the laws of the State of Indiana, and a citizen of said State, having its principal offices in the City of St. Louis, State of Missouri, and respectfully shows unto the Court that since the filing of the Amended Bill of Complaint in this cause, the complainant Wabash Railroad Company has transferred and conveyed to your petitioner, all of its railroads and properties, including all of the right, title and interest held and owned by said Railroad Company in and to the terminal properties, contracts, leases, easements, actions and causes of action described in the said Amended Bill of Complaint, by reason whereof the petitioner now owns and holds in its own right, all of the right, title, and interest formerly held

and owned by said Railroad Company in and to said terminal properties, contracts, leases, easements, actions and causes of action.

Wherefore your petitioner is advised that it is necessary for it to file in this cause its original Bill of Complaint in the nature of a Supplemental Bill, and your petitioner prays that leave be granted to file herein an original Bill of Complaint in the nature of a Supplemental Bill.

JAMES L. MINNIS,
H. S. BROWN,
Solicitors for Petitioner.

Endorsed: Filed May 31, 1916. Wm. C. McArthur, Clerk.

Order Granting Leave to Wabash Railway Company to File its Original Bill of Complaint in the Nature of a Supplemental Bill.

This cause coming on to be heard on the petition of the Wabash Railway Company for leave to file herein its original Bill of Complaint in the nature of a Supplemental Bill, and the Court having considered the said petition, and in view of the consent of all of the parties entered herein, and being fully advised in the premises, doth Order and Decree:

That leave be granted to petitioner Wabash Railway Company to file in this cause its original Bill of Complaint in the nature of a Supplemental Bill.

MARTIN J. WADE,
Judge.

Endorsed: Filed July 1st, 1916. Wm. C. McArthur, Clerk.

(Order Substituting Wabash Railway Co. for Wabash Railroad Co. as Party Complainant, etc.)

This cause coming on to be heard on this first day of July, 1916, on the bill of complaint in the nature of a supplemental bill filed herein by Wabash Railway Company, and the answers of the Chicago, Milwaukee and St. Paul Railway Company, The Wabash Railroad Company, and the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell and Son, and each of the parties to this cause being represented by their respective Solicitors; and the Court being fully advised in the premises, doth Order, Adjudge and Decree:

(1) That the bill of complaint filed herein by the Wabash Railway Company be in all things taken and considered as supplemental to the amended bill of complaint heretofore filed in this cause.

(2) That said Wabash Railway Company be substituted for and stand in the place of The Wabash Railroad Company as a party complainant in the said amended bill of complaint.

(3) That said Wabash Railway Company be, and is hereby granted the benefit of all the proceedings had in this cause in all respects as though the said amended bill of complaint had been filed by said Wabash Railway Company.

MARTIN J. WADE,
Judge.

Endorsed: Filed July 1st, 1916. Wm. C. McArthur, Clerk.

Bill of Complaint in the Nature of a Supplemental Bill of Wabash Railway Company.

The Wabash Railway Company, a railroad corporation created by and under the laws of the State of Indiana, a citizen of said State, having its principal offices in the City of St. Louis, State of Missouri, brings this its original bill of complaint in the nature of a supplemental bill against the Des Moines Union Railway Company, a corporation created by and under the laws of the State of Iowa, having its principal office in the City of Des Moines, in said last named State, and a citizen of the State of Iowa; Frederick M. Hubbell, a citizen of the State of Iowa, and a resident of the City of Des Moines, in Polk County in said District and Division, and Frederick C. Hubbell, also a citizen of the State of Iowa and a resident of said City of Des Moines, in Polk County, Iowa, which is in said District and Division, and the firm of F. M. Hubbell and Son, which is composed of said Frederick M. Hubbell and Frederick C. Hubbell, Defendants.

And thereupon your Orator complains and says:

I.

That on the — day of ——, the Chicago, Milwaukee and St. Paul Railway Company, a corporation, and The Wabash Railroad

Company, a corporation, as Complainants, exhibited their original bill of complaint in this Honorable Court, against the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell and Son, as Defendants, being Number 2449, in Equity. And thereafter by order of this Honorable Court the said Complainants filed in said cause their amended bill of complaint therein, praying as follows:

1. That it be declared that, on the terms stated in said contract of January 2nd, 1882, the complainants, their successors and assigns, are entitled, for railroad purposes, to the joint and exclusive use, in common and in perpetuity, of all the pieces and parcels of real estate, together with all buildings, tracks and improvements thereon, or appurtenant thereto, in said City of Des Moines, heretofore conveyed to the Des Moines Union Railway Company by James F. Rex, James F. How, Trustee, Grenville M. Dodge, the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Frederick M. Hubbell and J. S. Polk, and each of them, and all additions thereunto made by exchange or by purchase for extensions of tracks or building grounds, where such purchases were made either by rents of the original property or by the proceeds of mortgage bonds issued as aforesaid; and that the said Frederick M. Hubbell and Frederick C. Hubbell, and each of them, their counsel, solicitors, officers, agents and attorneys be perpetually restrained by the order and injunction of this Honorable Court, from in any wise interfering with, or obstructing your orators, their officers, agents or servants, in the aforesaid use of said properties and appurtenances.

2. That said Des Moines Union Railway (The Terminal) Company, its officers and agents, be required to render unto your orators a full and true account of all moneys heretofore received by it or them, on account of the switching or handling of cars, or traffic, on or over said terminal properties or any part thereof, for all persons or corporations whomsoever, other than complainants; of all sums of money received from or on account of rentals of real estate, buildings and improvements, as well as the income derived from all other sources connected with the use or operation of said terminal properties, giving the dates and sources from which the same were derived; the amounts expended and the purposes and dates of all expenditures; the balance now on hand, and a full and true statement and description of all properties acquired and improvements made and paid for with or from moneys received by it or them, on account of the aforesaid operation and use of said real estate, buildings, tracks and terminals.

3. That it be declared that complainants, their successors and assigns, are entitled to have and enjoy the exclusive use, in common and in perpetuity, of all the real estate, tracks, buildings, improvements and terminal facilities in said City of Des Moines, that have been, or may be hereafter acquired, erected or made, either in the name of the Terminal Company, or in the name of any other corporation or person, with the income or earnings derived from the rental, operation or use of said terminal properties, or any part thereof, or from sale of mortgage bonds heretofore issued or hereafter issued in the name of said Terminal Company.

4. That the Terminal Company be required to pay over to complainants all sums of money now in its possession or under its control (in excess of the sum of $25,000.00, to be retained as a working fund), received by it on account of the switching or hauling of cars or traffic, on or over said terminal properties, or any part thereof, for all persons or corporations, other than complainants; and all sums of money received from, or on account of rentals of real estate or buildings, as well as income derived from all other sources connected with the use or operation of said terminal properties, or any part thereof, in the proportion that the wheelage of each complainant has borne to the total wheelage over said terminals during the months such moneys were earned or accrued.

5. That it be adjudged and decreed that the Articles of Incorporation of said Terminal Company, as the same were adopted, signed and filed on or about the 10th day of December, 1884, are now in full force and effect; that the same have never been amended, and that all alleged and pretended amendments thereof are void and of no effect.

6. That all extensions of tracks that have been constructed by said Frederick M. Hubbell or Frederick C. Hubbell, or by any person or persons for them, or by any corporation organized and controlled by them, or either of them, partly on said terminal properties and partly on real estate or right of way acquired by them, or either of them, be decreed to be a part and parcel of said terminal properties, and that complainants be permitted to have the use thereof, in common and in perpetuity on such terms and under such regulations as to the Court shall seem equitable.

7. That said defendants, Frederick M. Hubbell and Frederick C. Hubbell, and each of them, be, by the order and decree of the Court, enjoined and prohibited from hereafter asserting, claiming or publishing that said Terminal Company, is the owner in fee simple of all or any of said terminal properties, or that the only rights complainants now have therein were acquired under the said contract dated May 1st, 1889, or that after the expiration of said contracts, to-wit, after the 1st day of May, 1918, complainants will have no right to further use said terminals, excepting on such terms and for such compensation as may be agreed upon between them and said Terminal Company.

8. That the Terminal Company be required to appoint from time to time, an Executive Committee, who shall be the nominees and representatives respectfully of your Orators, their successors and assigns, which Committee shall have power to appoint a Superintendent who shall have charge of the operation, repair and management of said depot grounds and terminal facilities, including station buildings, tracks, round houses and shops, and that in default of such appointment by the Board of Directors of the Terminal Company, such Committee be, from time to time appointed by the Court.

9. That said Frederick M. Hubbell and Frederick C. Hubbell and said firm of F. M. Hubbell & Son be perpetually restrained by the order and injunction of this Court from selling, pledging or otherwise disposing of the shares of the nominal Capital Stock of said Terminal Company that have been issued in their names, and that as holders of said stock certificates they be restrained by the order and injunction of this Court from exercising any control or management of said terminals and terminal properties excepting such as shall be in accordance with the terms and spirit of the aforesaid contract dated January 2nd, 1882, and herein referred to as Exhibit "A."

10. That defendant, Frederick M. Hubbell and Frederick C. Hubbell, and said Terminal Company, and each of them, be perpetually restrained by the order and injunction of this Court, from executing any lease, or entering into any contract for the use of said terminal properties by any person or corporation, after the expiration of said contract of May 10, 1889 (herein referred to as Exhibit "P,") that will in any manner interfere with or impair the rights of your orators to use said terminals in common and in perpetuity as provided in said contract of January 2nd, 1882, herein referred to as Exhibit "A."

11. That it be adjudged and decreed that the Des Moines Union Railway Company took and now holds the title to all the real estate that has been heretofore, or may be hereafter acquired by or conveyed to it, for terminal purposes in the City of Des Moines, together with all the buildings, tracks and other improvements thereon, as trustee, for the Des Moines & St. Louis Railway Company, the Des Moines Northern Railway Company, the St. Louis, Des Moines & Northern Railway Company, and the complainants herein, as their successors and assigns, now are and shall be hereafter entitled to the permanent use of the same as and for terminals for said railroads in the City of Des Moines, on the terms and conditions stated in said contract of January 2nd, 1882, to-wit: On condition that they pay the cost of supervising, maintaining and operating said terminals and the cost of all insurance, taxes and assessments thereon according to their proportionate use thereof, as evidenced by their wheelage upon and over said terminals.

12. And that your orators may have such other and further relief in the premises as the nature of the cause shall require and as to the Court shall seem meet.

And your orator further shows that the said defendants appeared and put their answer to said amended bill. That said amended bill and answer now remain as of record in this Honorable Court, and Complainant takes leave to make reference thereto.

II.

Your Orator further represents and shows to the Court that since the filing of the said amended bill of complaint the Equitable Trust Company of New York, as Trustee, filed its bill of complaint in the District Court of the United States, for the Eastern Division of the Eastern Judicial District of the State of Missouri, against The Wabash Railroad Company and James B. Forgan, praying therein the foreclosure of a certain mortgage theretofore executed and delivered by The Wabash Railroad Company to secure the payment of certain bonds of said Railroad Company, as described in said bill of complaint; that said mortgage conveyed to the said Equitable Trust Company, and said James B. Forgan, as Trustees, all of the Railroads and properties of The Wabash Railroad Company, including all of the right, title and intrest of the Wabash Railroad Company in and to the terminal properties, contracts, leases, easements, actions and causes of action, described and referred to in the said

amended bill of complaint heretofore filed in this Honorable Court by the said Chicago, Milwaukee and St. Paul Railway Company and The Wabash Railroad Company, against the Des Moines Union Railway Company and others, as stated in Paragraph I, hereof.

That on or about the second day of February, 1912, the said Equitable Trust Company of New York, as Trustee, filed in this Honorable Court its ancillary bill of complaint against The Wabash Railroad Company and James B. Forgan, praying the foreclosure of *said* mortgage of the Wabash Railroad Company. That thereafter, such proceedings were had in said foreclosure suits that a decree of foreclosure of said mortgage (to which reference is hereby made) was entered therein in the District Court of the United States, for the Eastern Division of the Eastern Judicial District of the State of Missouri, and in this Honorable Court, and all of the railroads and properties of The Wabash Railroad Company were directed to be sold to satisfy and pay the bonds of the Wabash Railroad Company secured by said mortgage. That pursuant to the terms of said decree, all of the railroads and properties of The Wabash Railroad Company were thereafter sold to, and purchased by, your Orator, including all of the right, title and interest held and owned by The Wabash Railroad Company in and to the terminal properties, contracts, leases, easements, actions and causes of action, described in the said amended bill of complaint, described in Paragraph I, hereof.

III.

Your Orator further represents and shows unto the Court that, by a certain Indenture made the 22nd day of October, 1915, between Chester H. Krum, as Special Master, party of the first part; said The Wabash Railroad Company, party of the second part; Edward B. Pryor and Edward F. Kearney as Receivers of The Wabash Railroad Company, parties of the third part; the said Equitable Trust Company of New York as Trustee, under the aforesaid mortgage of The Wabash Railroad Company, party of the fourth part; James B. Forgan, as one of the Trustees under the aforesaid mortgage, party of the fifth part; Henry Rogers Winthrop and Robert Goelet as a Purchasing Committee, parties of the sixth part, and your Orator, Wabash Railway Company, as party of the seventh part, the said parties of the first, second, third, fourth, fifth and sixth parts to said indenture, did thereby and for the considerations in said Indenture mentioned, grant, bargain, sell, alien, remise, release, convey, confirm assign transfer and set over unto your Orator, and to its successors and assigns, in fee simple and absolute, all and singular the rail-

roads, property, rights, franchises, privileges, immunities and appurtenances to the same belonging; rolling stock, bonds, stocks or interests in stocks, debentures, contracts, choses in action, property, premises and rights of every kind and description covered by and embraced in the aforesaid mortgage of The Wabash Railroad Company as adjudged in the said decrees of foreclosure; also all terminals, terminal property and interest in terminals, union depots or stations of said The Wabash Railroad Company wheresoever situate, and all other property of every kind and description owned by said Railroad Company at the time of the execution and delivery of its said mortgage, and appurtenant to or used in connection with its lines of railroad, as well as any other property appurtenant to the lines of railroad; also any and all corporate and other rights, powers, privileges and franchises, easements, tenements, hereditaments and appurtenances, reversions and remainders, which the said Railroad Company had at the time of the execution and delivery of its said mortgage, or which it subsequently acquired for or appurtenant to the construction, maintenance, use or operation of the lines of railroad, extensions and branches, or any part thereof, covered by the said mortgage, and any and all rents, issues, profits, tolls, and other income of said lines of railroad, extensions and branches or any part thereof, and all of the estate, right, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said Railroad Company, of in and to the said lines of railroad, terminals and other property, and any and every part thereof, with all the appurtenances; also all the right, title, interest, rents, issues, profits, tolls, revenues and other income of the said Railroad Company, under any and all leases, leaseholds, rights under leases or contracts, traffic agreements, trackage agreements and operating agreements for the use, or joint use with other companies, of the railroads, terminals, union stations, bridges and other property wheresoever situated, belonging to any other company or companies, or by reason of which the said Railroad Company is entitled to handle or to have its business and traffic handled by or over such lines of railroad, terminals, union stations or bridges; also five hundred shares of the par value of One Hundred Dollars each of the capital stock of the Des Moines Union Railway Company; also, generally, all property of every kind and description and of whatever nature and wheresoever located, interests, rights, claims, demands, judgments, choses in action, rights of action and causes of action adjudged by said foreclosure decrees to be covered by or included in the said mortgage, whether originally or as after acquired property thereunder.

That by the terms of the Indenture aforesaid, The Wabash Railroad Company parted with all of its rights, title, interest, claims, estate and easements, in and to the terminal properties, contracts, leases, actions, and causes of action described in the amended bill of complaint filed in this Court by the Chicago, Milwaukee and St. Paul Railway Company, and The Wabash Railroad Company against the Des Moines Union Railway Company, and others, as described in Paragraph I, hereof; and your Orator has thereby acquired and now owns and holds in its own right, all of the right, title, interest, estate, easements, claims, demands, actions and causes of action, the right and claim to which was alleged to be in The Wabash Railroad Company by the aforesaid amended bill of Complaint.

A copy of said Indenture is hereto attached marked Exhibit "A" and made a part hereof.

IV.

Your Orator hereby adopts all and singular the averments contained in the amended bill of complaint heretofore filed in this Honorable Court by the Chicago, Milwaukee and St. Paul Railway Company and The Wabash Railroad Company against the Des Moines Union Railway Company and others, as described in Paragraph I, hereof, and avers the same to be true.

V.

In consideration whereof, and forasmuch as your Orator is without remedy in the premises, under the strict rules of the common law, and cannot have any relief except in a Court of Equity, where matters of this sort are properly cognizable and relievable; to the end, therefore, that the said Des Moines Union Railway Company and said Frederick M. Hubbell and Frederick C. Hubbell and F. M. Hubbell and Son, the Chicago, Milwaukee and St. Paul Railway Company and The Wabash Railroad Company, may be required to make answer according to the best of their knowledge, information and belief, to all and singular the matters hereinabove stated, as charged, as fully and completely as if the same were repeated, and they were thereunto particularly interrogated (but not under oath, answers under oath being hereby expressly waived) your Orator prays:

1. That this bill be taken and considered as supplemental to the said amended bill of complaint heretofore exhibited in this Honorable Court by the Chicago, Milwaukee and St. Paul Railway Company, and The Wabash Railroad Company, as complainants against the Des Moines Union Railway Company, and others, as defendants, being Number 2449 in Equity.

2. That an order be entered herein directing that your Orator, Wabash Railway Company be substituted for and stand in the place of The Wabash Railroad Company, as a complainant in the said amended bill of complaint.

3. That your Orator may be granted the benefit of all of the proceedings had in the said suit.

4. That your Orator be granted the full relief prayed for in said amended bill of complaint in all respects as though the said amended bill of complaint had been brought by your Orator.

5. That your Orator may be granted such other and further relief in the premises, as the nature of the case shall require, and as to the Court shall seem meet.

May it please the Court to grant unto your Orator, writs of subpoena, to be directed to the said defendants, the Des Moines Union Railway Company, Frederick M. Hubbell and Frederick C. Hubbell, and F. M. Hubbell and Son, commanding them and each of them at a certain time, and under a certain penalty therein to be named, to appear before your Honor in this Honorable Court, and then and there severally to answer all and singular the matters aforesaid (but not under oath), and to stand to, abide, and perform such other and further orders and decrees herein as to your Honor shall seem meet.

JAMES L. MINNIS,
N. S. BROWN,
Solicitors for Complainant.

STATE OF MISSOURI,
City of St. Louis, ss:

On this 29th day of May, 1916, came James L. Minnis, who made oath that he is Vice President of Wabash Railway Company; that he has read the foregoing bill of complaint and knows the contents thereof, and the same are true.

JAMES L. MINNIS.

Subscribed and sworn to before me this 29th day of May, A. D. 1916.

[SEAL.] JOSEPH H. MILLER,
Notary Public.

My Commission expires Nov. 9, 1919.

Endorsed: Filed July 1st, 1916. Wm. C. McArthur, Clerk.

(Answer of Chicago, Milwaukee & St. Paul Ry. Co. et al. to Bill of Complaint in Nature of Supersedeas Bill filed by Wabash Railway Co.)

Come now the Chicago, Milwaukee and St. Paul Railway Company and The Wabash Railroad Company, and for their answer to the bill of complaint in the nature of a supplemental bill filed herein by Wabash Railway Company, admit the averments of said bill.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By J. C. COOK,
Its Solicitor.
THE WABASH RAILROAD COMPANY,
By JAMES L. MINNIS,
N. S. BROWN,
Its Solicitors.

Endorsed: Filed July 1st, 1916. Wm. C. McArthur, Clerk.

(Answer of Des Moines Union Ry. Co. et al. to Bill of Complaint in Nature of Supplemental Bill of Complaint Filed by Wabash Ry. Co.

Come now the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell and Son, and for their answer to the bill of complaint in the nature of a supplemental bill, filed herein by Wabash Railway Company, admit the averments of paragraphs I, II and III, of said bill of complaint; but deny that either Wabash Railway Company or The Wabash Railroad Company is entitled, in Equity, to any relief as prayed for in the amended bill of complaint heretofore filed herein, for the reasons alleged in the answer of these defendants to said amended bill of complaint, and heretofore filed in this cause, to which reference is hereby made.

THE DES MOINES UNION RAILWAY COMPANY,
FREDERICK M. HUBBELL,
FREDERICK C. HUBBELL AND
F. M. HUBBELL AND SON,
By F. W. LEHMAN,
PARKER, PARISH & MILLER,
Their Solicitors.

Endorsed: Filed July 1st, 1916. Wm. C. McArthur, Clerk.

(*Record Entry of Hearing for Purpose of Settling Decree, May* 15, 1916.

Before Judge Wade.

On this day this cause came on for hearing for the purpose of settling a Decree in this cause. The Chicago, Milwaukee & St. Paul Railway Company appearing by J. C. Cook, its attorney, the Wabash Railroad Company appearing by J. L. Minnis, its attorney, and the defendants appearing by J. L. Parrish and F. W. Lehmann, their attorneys and the matter having been fully submitted to the court is by the court taken under advisement.

(*Memorandum of District Court upon Entry of Decree.*)

I am entering decree in which I have tried to describe briefly the rights, duties, and obligations which I find exist between the parties. I found it impossible to make any specific finding of fact, because any finding of fact would be inadequate unless so complete as to be impractical in a decree. I have not found it possible to include in the decree, as asked by complainants, a copy of the contract of 1882 because if it should be now adjudged that the rights of the parties were such as provided for in the contract of 1882, it would then leave for the future the question as to the meaning of the contract of 1882—one of the very questions involved in this case. In truth this decree grants complainants every right it had under contract of 1882 except with relation to the management and control, and profits of the property.

So far as the right to the use of the properties is concerned; for every purpose of the complainants as public service corporations, this decree recognizes the same and protects the complainants in such rights. I feel that this disposes of the point urged by counsel that these corporations could not dispose of any of their properties so as to deprive themselves of the power or capacity to serve the public in accordance with their franchises. If complainants have made a transaction in such form that so far as their public service is concerned they have not impaired their power or capacity, this is as far as the public is interested so far as the question of retaining franchise is concerned.

As to the management, control and profits, I feel that the parties have disposed of the same in the organization of the corporation, the transfer of the properties, and the subsequent transactions in relation thereto.

As I indicated in original opinion, some of these rights have been affected more by estoppel and asequiescence, than by definite intelligible contract or agreement.

I have tried to make clear and definite in this decree, the rights and duties of the parties, so that upon review by the Court of Appeals, there can be no question as to the points determined by the court, and so that in any future controversy, if any, between the parties, certain rights will be definitely and finally fixed either by this decree, or by such decree as the Court of Appeals may order entered herein.

I have felt that the full meaning of this decree could not be expressed without adjudicating the rights of the parties in the property—in the corporation, and in the surplus earnings; and I have tried to leave it in shape so that the questions presented by counsel can be intelligently reviewed.

As to costs, I feel that under the peculiar circumstances of this case, and the purpose and effect of this [litigations], and the results, that each party should pay half the costs.

MARTIN J. WADE,
Judge.

Endorsed: Filed August 29, 1916. Wm. C. McArthur, Clerk.

(Decree of District Court, August 29, 1916.)

Decree.

And now to-wit, on this 29th day of August, 1916, this cause having been heretofore fully submitted, and the Wabash Railway Company having, under authority of the Court, joined as party complainant herein, and the court being now fully advised—It Is Ordered, Adjudged and Decreed—

First: That the defendant, The Des Moines Union Railway Company, is a corporation organized under the laws of the State of Iowa, with the power to own, maintain and operate a terminal railway within, and in the vicinity of the city of Des Moines, Polk County, Iowa; and that it is the owner of all the real estate, railway tracks, depot buildings, bridges, and other improvements constituting the terminal property and known as the terminal of the Des Moines Union Railway Company in the city of Des Moines, Iowa, and including all the property transferred to it by or in behalf of the complainant's predecessors, the Des Moines & St. Louis Railroad Company, The St. Louis, Des Moines & Northern Railway Company, and the Des Moines Northwestern Railway Company, and by James F. How and Grenville M. Dodge, Trustees, on or about the year 1887, and

all the real estate and other property since acquired by the said Des Moines Union Railway Company, including the franchise to own, operate and maintain a terminal railway in and about and in the vicinity of the city of Des Moines, Iowa, and that the ownership of such property is absolute and unqualified, and that the complainants have no right, title, easement, or interest therein.

Second. It is further Ordered, Adjudged and Decreed, that one of the corporate obligations assumed by the defendant, the Des Moines Union Railway Company, at the time of its organization, and at the time of acquiring the terminal property hereinbefore referred to, was to use said terminal property in perpetuity for the purpose of furnishing terminal service to the complainant's predecessors so long as they might be equitable, and that such corporate obligation now exists in favor of the complainants herein, and their successors or assigns. This corporate obligation is absolute, and is paramount to any other obligation of said corporation, and the use of its property and franchises for other purposes, or by other companies, shall be without prejudice to the use by these complainants, their successors and assigns, of such property and franchises in such reasonable manner as will enable them to perform their full duty to the public; but said use by the complainants shall be subject to all reasonable regulations of the defendant corporation, and shall not interfere with the use of such property and franchises by other railway companies, or persons, except in so far as may be reasonably necesary.

Third. The court finds that under date of May 10, 1889, and under date of July 31, 1897, certain contracts were made between the Des Moines Union Railway Company and the predecessors of the complainants herein, by the terms of which contracts, the conditions under which the Des Moines Union Railway Company should perform its corporate obligation to the complainants and their predecessors, and the amounts to be paid, were fixed and determined during the existence of said contracts, which expire on May 1st, 1918.

And It Is Now Ordered, Adjudged and Decreed, that the continued use of said property and franchises after May 1, 1918, shall be upon terms reasonable under all the facts and circumstances, including the past transactions between the complainants and the Des Moines Union Railway Company and its predecessors in so far as the same may aid in determining what may be reasonable. And if the parties cannot agree upon such terms, then the same shall be

fixed by a court upon aplication by any or all of the parties to this action, and any of the parties may make application to re-open this case for such purpose, or may avail themselves of any legal remedy which they may have.

Fourth. It Is Further Ordered, Adjudged and Decreed, that under the articles of incorporation and the amendments thereto, the Des Moines Union Railway Company is a legally organized corporation, and that the management and control thereof, and of its property and franchises, is in such corporation through its officers elected, or to be elected by its stockholders or directors as they may appear from the records of said corporation, and as provided in the articles of incorporation and amendments thereto; and that the complainants have no control over the management of said corporation, or interest in said corporation, except such rights as they may have as stockholders in said corporation.

Fifth. It is Further Ordered, Adjudged and Decreed, That The Des Moines Union Railway Company is the absolute owner of the "surplus earnings" held by such corporation, consisting of monies collected for rentals and privileges, and charges for switching and handling cars and traffic for companies other than the complainants and their predecessors, and that complainants have no interest therein except such as accrue- to them as stockholders of the Des Moines Union Railway Company.

Sixth. It Is Further Ordered and Adjudged, that complainants pay one half of the costs of this suit, to be taxed by the Clerk, and that the defendant—the Des Moines Union Railway Company, pay one half of the costs of this action, to be taxed by the Clerk, and that judgment is hereby rendered against said parties therefor.

To this Decree, complainants except, and the defendant, the Des Moines Union Railway Company, excepts to so much of said decree as adjudges that it is under obligation to use, or permit the use of said railway property for the purpose of furnishing to the complainants, terminal service in the city of Des Moines, Iowa.

To the failure of the court to enter decree in form presented by the different parties, they respectively except.

To the judgment against them for costs, complainants, and the Des Moines Union Railway Company, except.

Witness my hand.

MARTIN J. WADE,
Judge.

Endorsed: Filed: August 29th, 1916. Wm. C. McArthur, Clerk.

(*Petition for Appeal by Complainants and Order Allowing Same, etc.*)

To the Hon. Martin J. Wade, Judge of the United States District Court:

The above named Complainants, feeling themselves aggrieved by decree made and entered in this cause on the 29th day of August, A. D. 1916, do hereby appeal from said Decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and they pray that their appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said Decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis in the State of Missouri; and, desiring to supersede the execution of the Decree, your petitioners here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued, and that the proper order touching the security to be required of them to protect and appeal, be made.

J. C. COOK AND JOHN N. HUGHES, &
C. R. SUTHERLAND,
Solicitors and Attorneys for Complainants Chicago, Milwaukee & St. Paul Railway Company.

JAMES L. MINNIS,
Solicitor, Attorney for Complainants, Wabash R. R. Co. & Wabash Ry. Co.

The above Petition is granted, and the appeal is allowed and shall operate as a supersedeas upon the petitioners filing bond, in the sum of Five Thousand ($5,000.00) Dollars with sufficient sureties as required by law.

MARTIN J. WADE.
Judge of the District Court for the Southern District of Iowa.

Endorsed: Filed October 18, 1916. Wm. C. McArthur, Clerk.

(Assignment of Errors on Appeal by Complainants.)

The complainants above named respectfully complain and state that the Decree entered in this cause is erroneous for the following reasons:

First. The Court erred in adjudging and decreeing that the Des Moines Union Railway Company is the absolute and unqualified owner of all the properties, railways and franchises conveyed to it by the predecessors of complainants, or acquired by it since such conveyance, the same constituting its railway terminals in Des Moines, and that the Complainants have no right, title, easement or interest therein.

Second. The court erred in adjudging and decreeing that the Des Moines Union Railway Company had right and authority to impose terms, conditions, rentals, charges and regulations upon the complainants or either of them for the use of the terminal properties in the City of Des Moines after the first day of May, 1918, and right and authority to permit other railway companies or corporations to occupy and use said depot and terminal properties after that date.

Third. The Court erred in adjudging and decreeing that the use by complainants of the railway terminal properties and franchises at Des Moines, Iowa, after May 1, 1918, shall be upon terms imposed by the Des Moines Union Railway Company, or by agreement of the parties to this action, and that if the parties cannot agree upon such terms, then the same shall be fixed by a court upon application by any or all of the parties to this action, and in adjudging and decreeing that this cause may be re-opened for such purpose.

Fourth. The Court erred in adjudging and decreeing that the amendments to the articles of incorporation of the Des Moines

Union Railway Company are legal and valid, and that said corporation was legally organized under such amendments, and that the management and control of said Des Moines Union Railway Company and of the properties and franchises and railway now held in its name are now, and after May 1, 1918, will continue to be, in said corporation through its officers elected or to be elected by the stockholders as they may appear from the records of said corporation and as provided in the articles of incorporation and amendments; and that the complainants have no control over the management of said corporation, or interest in the property now held in its name, except such rights as they may have as stockholders therein.

Fifth. The Court erred in adjudging and decreeing that the Des Moines Union Railway Company is the absolute owner of the surplus earnings held by such corporation, consisting of moneys collected for rentals and privileges, charges for switching and handling cars and traffic for other companies; and that complainants' interest therein was only that of stockholders of the Des Moines Union Railway Company.

Sixth. The Court erred in failing and refusing to decree that on the terms stated in the contract of January 2, 1882, the Complainants, their successors and assigns, are entitled, for railroad purposes, to the joint and exclusive use in common and in perpetuity of all the pieces and parcels of real estate, together with all buildings, tracks, and improvements thereon, or appurtenances thereto, in the City of Des Moines, heretofore conveyed to the Des Moines Union Railway Company by James F. How, James F. How, Trustee, Grenville M. Dodge, the Des Moines & St. Louis Railroad Company, the Des Moines, Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Frederick M. Hubbell, and J. S. Polk, and each of them, and all other persons and all additions thereunto made by exchange or by purchase for extensions of tracks or building grounds, where such purchases were made either from rents of the original property, or from the proceeds of mortgage bonds.

Seventh. The Court erred in failing and refusing to adjudge and decree that complainants, their successors and assigns, are entitled to have and enjoy the exclusive use in common and in perpetuity, of all the real estate, tracks, buildings, improvements and terminal facilities in said City of Des Moines that have been, or may be hereafter acquired, erected or made, either in the name of the Terminal Company, or in the name of any other corporation or person, with

the income or earnings derived from the rental, operation or use of said terminal properties, or any part thereof, or from sale of mortgage bonds heretofore issued or hereafter issued in the name of said Terminal Company.

Eighth. The Court erred in failing and refusing to adjudge and decree that the Terminal Company be required to account for and pay over to complainants all sums of money now in its possession or under its control (in excess of the sum of $25,000.00 to be retained as a working fund), received by it on account of the switching or handling of cars, or traffic, on or over said terminal properties, or any part thereof, for all persons or corporations other than complainants; and all sums of money received from, or on account of rentals of real estate, or buildings, as well as income derived from all other sources connected with the use or operation of said terminal properties, or any part thereof, in the proportion that the wheelage of each complainant has borne to the total wheelage over said terminals during the months such money were earned or accrued.

Ninth. The Court erred in failing and refusing to adjudge and decree that the articles of incorporation of said Terminal Company, as the same were adopted, signed and filed, on or about the 10th day of December, 1884, are now in full force and effect; that the same have never been amended, and that all alleged and pretended amendments thereof are void and of no effect.

Tenth. The Court erred in failing and refusing to adjudge and decree that all extensions of tracks that have been constructed by said Frederick M. Hubbell or Frederick C. Hubbell, or by any person or persons for them, or by any corporation organized and controlled by them, or either of them, partly on said terminal properties and partly on real estate or right of way acquired by them, or either of them, be decreed to be part and parcel of said terminal properties, and that complainants be permitted to have the use thereof, in common and in perpetuity on such terms and under such regulations as to the Court shall seem equitable.

Eleventh. The Court erred in failing and refusing to adjudge and decree that the Des Moines Union Railway Company took and now holds the title to all the real estate that has been heretofore, or may be hereafter, acquired by or conveyed to it, for terminal purposes in the City of Des Moines, together with all the buildings, tracks and other improvements thereon, as Trustee, for the Des Moines &

St. Louis Ry. Co., the Des Moines Northern Ry. Co., the St. Louis, Des Moines & Northern Ry. Co., and the complainants herein, as their successors and assigns, and that the complainants herein, and their assigns, now are and shall be hereafter entitled to the permanent use of the same as and for terminals for their said railroads in the City of Des Moines, on the terms and conditions stated in said contract of January 2, 1882.

Twelfth. The Court erred in failing and refusing to adjudge and decree that the Des Moines Union Railway Company took and now holds the title to all the real estate that has been heretofore or may be hereafter acquired or conveyed to it for terminal purposes in the City of Des Moines, together with all the buildings, tracks, facilities and other improvements thereon, subject to the joint and common use of the Des Moines and St. Louis Railway Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines and Northern Railway Company, and the complainants herein, and their successors and assigns, and that the complainants herein and their assigns now are and shall be hereafter entitled to the permanent and exclusive use and enjoyment of the same as and for terminals for their said railroads in the City of Des Moines, on the terms and conditions stated in said contract of January 2, 1882.

Thirteenth. The Court erred in failing to adjudge and decree that the defendants be enjoined from asserting any claim to the property inconsistent with the said right of the complainants, their successors and assigns, to the joint use and occupation of said property and all parts thereof.

Fourteenth. The Court erred in failing by its judgment and decree to require the Des Moines Union Railway Company to appoint an Executive Committee, the members of which to be nominated by the complainants and their assigns, and adjudging and decreeing that such committee should appoint a superintendent to operate, maintain and repair the said property and facilities; and that on default of such appointment, the court would from time to time appoint such committee.

Fifteenth. The Court erred in failing and refusing to enjoin and restrain the defendants, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell and Son from selling, pledging or otherwise disposing of their shares of the capital stock of the Des Moines Union Railway Company, and from exercising, by virtue of said shares, any control or management of said properties and facilities except in accordance with the terms and spirit of the said contract entered into

on January 2, 1882, being "Exhibit A," attached to the Bill of Complaint.

Sixteenth. The Court erred in failing and refusing by its decree to restrain defendants from executing any leases or entering into any contracts for the use of said properties and facilities which may interfere with, or impair, the rights of complainants, their successors and assigns, to the use and enjoyment of said property and facilities in accordance with said contract of January 2, 1882.

Seventeenth. The Court erred in failing and refusing to adjudge and decree the relief prayed for in the Amended Bill of Complaint as Amended.

Eighteenth. The Court erred in adjudging and decreeing that the complainants shall pay one-half of the costs of this action, or any part thereof.

Nineteenth. The Court erred in adjudging and decreeing that the Des Moines Union Railway Company held the railway terminal properties in controversy in this suit, in any other capacity than as trustee for the complainants.

Twentieth. The Court erred in failing and refusing to decree a right in the complainants to own, use, possess and occupy the terminal properties, franchises and railways in the City of Des Moines, Iowa, in perpetuity on the terms [States] in the contract of January 2, 1882.

Twenty-first. The Decree is contrary to equity.

Twenty-second. The Decree is contrary to law.

Twenty-third. The Court erred in adjudging and decreeing any rights to the properties in controversy in the defendants or either of them.

Twenty-fourth. The Court erred in not holding, adjudging and decreeing that after May 1, A. D. 1918, the contract of January 2nd, A. D. 1882, being Exhibit "A" to the Bill of Complaint as amended, will govern the parties in the use, maintenance and operation of the terminal property and that the Des Moines Union Railway Company is under obligation to hold, maintain and devote the same to the use by complainants and their successors in title or interest perpetually, under and according to the terms and intent of said contract of January 2, 1882.

Twenty-fifth. The Court erred in not holding and decreeing that after May 1, 1918, the only compensation required of complainants, their successors or assigns, shall be the performance of the requirements imposed by the contract of January 2, 1882, being Exhibit "A" to the Bill of Complaint or petition of plaintiff herein.

Twenty-sixth. The Court erred in not holding and decreeing that the contract of January 2, 1882, being Exhibit "A" to the Bill of Complaint, fixes the terms and conditions under which the complainants or plaintiffs and their successors may occupy and use the terminal property held by the Des Moines Union Railway Company after May 1, A. D. 1918.

Wherefore, the complainants pray that the said Decree be reversed, and that the District Court be instructed to enter such decree as is prayed for by the said Bill of Complaint.

J. C. COOK AND
JOHN N. HUGHES &
C. R. SUTHERLAND,
Attorneys for Complainant C. M. & St. P. Ry. Co.

JAMES L. MINNIS,
Solicitor, Attorney for Complainant Wabash R. R. Co. and Wabash Ry. Co.

Endorsed: Filed: Oct. 18,1916. Wm. C. McArthur, Clerk.

(Joint Præcipe for Transcript on Complainant's Appeal.)

The parties to the above entitled action hereby make and file this, their joint præcipe, and indicate the parts of the record to be incorporated by the Clerk in the transcript on the appeal of this cause as follows:

First. Include the Summons and original Bill of Complaint.

Second. Include the Answer to the original Bill.

Third. Include the Amended Bill of Complaint as Amended.

Fourth. Include the Answer to the Amended Bill of Complaint as Amended and all amendments to such Answer, except amendment to answer filed Dec. 2, 1912.

Fifth. Include the evidence as approved and certified by the Judge of this court and made of record herein, including deposition of Mark L. Mitchell, et al. filed January 6th, 1913.

Sixth. Include the Petition of the Wabash Railway Company filed on or about the 1st day of July, 1916, requesting to be made a party in this suit, and the Answers to that pleading.

Seventh. Include the Opinion of the Court, filed on or about the 24th day of Feb. 1916.

Eighth. Include the Supplemental Opinion and the Decree of the Court filed on or about the 29th day of August, 1916.

Ninth. Include all record entries made during the pendency of this cause.

Tenth. Include the Petition for Appeal, Assignment of Errors, and Order allowing the appeal.

Eleventh. Include Bond on Appeal and all endorsements thereon.

Twelfth. Include the Citation with endorsements of service.

J. C. COOK,
J. L. MINNIS AND
JOHN N. HUGHES,
Attorneys for Appellant.

F. W. LEHMAN,
PARKER PARRISH & MILLER,
Attorneys for Appellee.

Endorsed: Filed October 27th, 1916. Wm. C. McArthur, Clerk.

(Complainant's Supersedeas Bond on Appeal.)

Know All Men By These Presents, That we, the Chicago, Milwaukee & St. Paul Railway Company, The Wabash Railroad Company, and The Wabash Railway Company, as principals, and the London & Lancashire Indemnity Company of America, as surety, acknowledge ourselves to be jointly indebted to the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell & Son, appellees in the above cause, in the sum of Five Thousand ($5,000.00) Dollars, conditioned that,

Whereas, on the 29th day of August, A. D. 1916, in the District Court of the United States for the Southern District of Iowa, in a suit depending in that court, wherein the Chicago, Milwaukee & St. Paul Railway Company, The Wabash Railroad Company, and the Wabash Railway Company were complainants, and the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son were defendants, a decree was rendered against the said Chicago, Milwaukee & St. Paul Railway Company, Wabash Railroad Company and the Wabash Railway Company, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the office of the clerk of the court, to reverse the said decree, and a citation directed to the said Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell, and F. M. Hubbell & Son, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Eighth Circuit to be holden in the City of St. Louis in the State of Missouri on the first Monday of May 1917.

Now, if the said Chicago, Milwaukee & St. Paul Railway Company, The Wabash Railway Company, the Wabash Railroad Company shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and effect.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.,
By J. C. COOK AND JOHN N. HUGHES & C. R. SUTHERLAND.
WABASH RAILROAD COMPANY,
By JAMES L. MINNIS,
General Solicitor.
WABASH RAILWAY COMPANY.
By JAMES L. MINNIS,
Vice President, Principal.
LONDON, LANCASHIRE INDEMNITY CO. OF AMERICA,
By JOHN E. RHODES, JR.,
Attorney in Fact, Surety.

[Seal of Surety Co.]

Bond approved this 18th day of October, 1916.
MARTIN J. WADE,
Judge.

Endorsed: Filed October 18th, 1916. Wm. C. McArthur, Clerk.

Clerk's Certificate.

STATE OF IOWA,
Polk County, ss:

I, A. E. Mahan, Clerk of the District Court in and for said County and State, hereby certify that the sureties on the attached Bond are amply sufficient for the penalty of the same, and that if said Bond were presented to me for approval I would approve it.

Witness my hand and the seal of said Court affixed at Des Moines, Iowa, this 10th day of Nov. A. D. 1916.

A. E. MAHAN,
Clerk of District Court.
A. E. CULLY,
Deputy.

Endorsed: Filed November 14th, 1916. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

(Petition for Appeal by Defendants and Order Allowing Same.)

To the Honorable M. J. Wade, District Judge:

The above named defendants, the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 26th day of August, 1916, do hereby appeal from the said decree to the circuit court of appeals for the eighth circuit, for the reasons set forth in the assignments of error filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated, be sent to the United States circuit court of appeals for the eighth circuit, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

DES MOINES UNION RAILWAY COMPANY,
FREDERICK M. HUBBELL,
FREDERICK C. HUBBELL,
F. M. HUBBELL & SON,
By F. W. LEHMANN,
PARKER, PARRISH & MILLER,
Their Attorneys.

Appeal allowed upon giving bond, as required by law, in the sum of Five Thousand dollars ($5000.00).

Dated this 13th day of November, A. D. 1916.

MARTIN J. WADE,
Judge.

Endorsed: Filed November 14 1916. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

(*Assignment of Errors by Defendants.*)

Filed Nov. 14, 1916.

Come now the defendants in the above entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of their appeal in the above entitled cause from the decree made by this Honorable Court on the 26th day of August, 1916:

I.

The United States district court for the southern district of Iowa erred in holding, adjudging and decreeing that the defendant, the Des Moines Union Railway Company, owed to the complainants a corporate obligation to use the terminal property in perpetuity for the purpose of furnishing terminal services to complainants.

II.

The United States district court for the southern district of Iowa erred in holding, adjudging and decreeing that said corporate obligation is absolute and paramount to any other obligation of the defendant, Des Moines Union Railway Company, and that the use of the terminal property and franchises of the defendant corporation for other purposes or by other companies should be without prejudice to the use by these complainants, their successors and assigns of such [propefty] and franchises.

Wherefore, the defendants pray that said decree be reversed as to the matters above referred to, and that said district court for the southern district of Iowa be ordered to enter a decree reversing the decision of the lower court in said cause in respect to the matters complained of.

F. W. LEHMANN,
PARKER, PARRISH & MILLER,
Attorneys for Defendants.

(Defendants' Supersedeas Bond on Appeal.)

Know All Men By These Presents:

That we, Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, as principals, and H. D. Thompson and Oliver P. Thompson as sureties, of the county of Polk and state of Iowa, are hereby held and firmly bound unto the Chicago, Milwaukee & St. Paul Railway Company, The Wabash Railroad Company and Wabash Railway Company in the sum of Five Thousand dollars ($5000.00) lawful money of the United States, to be paid to them and their respective executors, administrators and successors, for which payment well and truly to be made [*be*] bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators and successors by these presents.

Sealed with our seals and dated this 10th day of November 1916.

Whereas, the above named Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son have prosecuted an appeal to the United States circuit court of appeals for the eighth circuit, to reverse the judgment and decree of the district court, for the southern district of Iowa, in the above entitled cause;

Now Therefore, the condition of this obligation is such that if the above named Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son shall prosecute their said appeal to effect and pay all costs if they fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

DES MOINES UNION RAILWAY COMPANY,
By F. M. HUBBELL,
Secretary.
F. M. HUBBELL & SON,
FREDERICK M. HUBBELL,
FREDERICK C. HUBBELL,
Principals.
H. D. THOMPSON,
OLIVER P. THOMPSON,
Sureties.

Endorsed: Filed November 14, 1916. Wm. C. McArthur, Clerk.

(Joint Præcipe for Transcript on Defendants' Appeal.)

The parties hereto having heretofore filed a joint præcipe [indication] the parts of the record to be incorporated in the complainants' appeal, hereby join and indicate that in addition thereto there shall be incorporated by the clerk in the transcript on the appeal of this cause the following:

1. Include the defendants' petition for appeal, defendants' assignment of errors, and the order allowing defendants' appeal.

2. Include the bond given by defendants on appeal, and all endorsements thereon.

3. Include citation on defendants' appeal, with endorsements of service thereon.

J. C. COOK,
JOHN N. HUGHES AND
J. L. MINNIS,
Attorneys for Complainants.
F. W. LEHMAN,
PARKER, PARRISH & MILLER,
Attorneys for Defendants.

Endorsed: Filed November 21 1916. Wm. C. McArthur, Clerk.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
Southern District of Iowa, ss:

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa hereby certify the above and foregoing to be a full, true and complete transcript of the record in the cause numbered 4001-Eq. Chicago, Milwaukee & St. Paul Railway Company and Wabash Railroad Company, Complainants vs. Des Moines Union Railway Company, et al., defendants, said transcript embracing 149 numbered pages; Page 5, being a printed bill of complaint of 42 pages; Page 28, being a printed copy of the amended bill of complaint, as amended, cont-ining 115 pages; Page 32, being the answer to the amended bill of complaint, containing 54 pages; Page 39, consisting of the printed volume of 665

pages preceeded by 10 pages of printed index, entitled, "Testimony for complainants with an index"; Page 40, being the printed volume of 366 pages and 1 page of index, entitled, "Defendants' Testimony" and Page 41, being the printed volume of 761 pages marked "Exhibits Defendants' Testimony," being all the matters called for in the præcipes for a transcript filed herein, as full, true and complete as the originals thereof remain on file and of record in office in the City of Des Moines in said District Court. I further certify that I transmit herewith as part of said transcript the original Citation issued on behalf of Complainants October 18th 1916 and the original Citation issued on behalf of Defendants December 20th 1916.

In Witness Whereof I hereunto set my hand and affix the seal of said Court at office in the City of Des Moines in said District this 19th day of January A. D. 1917.

[Seal U. S. Dist. Court, Southern Dist. of Iowa.]

WM. McARTHUR,
Clerk U. S. District Court Southern District of Iowa.

Nos. 4885 and 4886, Filed Feb. 3 1917 John D. Jordan Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Mr. J. C. Cook and Mr. John N. Hughes as Counsel for the Appellant, Chicago, Milwaukee & St. Paul Railway Company, in Cause No. 4885.)

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE WABASH RAILROAD COMPANY and WABASH RAILWAY COMPANY, Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL, and F. M. HUBBELL & SON.

The Clerk of said Court will please enter our appearance for the appellant, the Chicago, Milwaukee & St. Paul Railway Company, in the above entitled cause.

J. C. COOK,
JOHN N. HUGHES,
Attorneys for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 5, 1917.

(*Appearance of Mr. James L. Minnis and Mr. N. S. Brown as Counsel for the Appellants, Wabash Railroad Co., et al., in Cause No.* 4885.)

The Clerk will enter *my* appearance as Counsel for the Appellants The Wabash Railroad Company and Wabash Railway Company.

JAMES L. MINNIS,
N. S. BROWN,
1419 *Railway Exchange Building, Saint Louis, Missouri.*

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 6, 1917.

(*Appearance of Mr. F. W. Lehmann, Mr. J. L. Parrish, and Mr. W. E. Miller, as Counsel for Appellees in Case No.* 4885.)

The Clerk will enter *my* appearance as Counsel for the Appellees.

F. W. LEHMANN,
St. Louis, Missouri.

J. L. PARRISH,
Des Moines, Iowa.

W. E. MILLER,
Des Moines, Iowa.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 24, 1917.

(*Appearance of Mr. Frederick W. Lehmann as Counsel for Appellees in Cause No.* 4885.)

The Clerk will enter my appearance as Counsel for Appellees.

FREDERICK W. LEHMANN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 30, 1917.

(*Appearance of Mr. Burton Hanson as Counsel for Appellants in Cause No.* 4885.)

The Clerk will enter my appearance as Counsel for the Appellants.

BURTON HANSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 21, 1917.

(Appearance of Mr. F. W. Lehmann, Mr. J. L. Parrish and Mr. W. E. Miller as Counsel for Appellants in Cause No. 4886.)

No. 4886.

THE DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. et al.

The Clerk will enter *my* appearance as Counsel for the Appellants.

F. W. LEHMANN,
St. Louis, Mo.
J. L. PARRISH,
Des Moines, Ia.
W. E. MILLER,
Des Moines, Ia.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 6, 1917.

(Appearance of James L. Minnis and Mr. N. S. Brown as Counsel for the Appellees, Wabash Railroad Co. et al., in Cause No. 4886.)

The Clerk will enter *my* appearance as Counsel for the Appellees, The Wabash Railroad Company and Wabash Railway Company.

JAMES L. MINNIS,
N. S. BROWN,
1419 *Railway Exchange Building, Saint Louis, Missouri.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 6, 1917.

(Appearance of Mr. J. C. Cook and Mr. Burton Hanson as Counsel for Appellees in Cause No. 4886.)

The Clerk will enter *my* appearance as Counsel for the Appellees.

J. C. COOK.
BURTON HANSON.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 24, 1917.

(*Order of Argument in Both Causes.*)

May Term, 1917, Thursday, May 24, 1917.

No. 4885.

CHICAGO, MILWAUKEE and ST. PAUL RY. Co. et al., Appellants,

vs.

DES MOINES UNION RAILWAY Co. et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

and

4886.

DES MOINES UNION RAILWAY Co. et al., Appellants,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RY. Co. et al.

Appeal from the District Court of the United States for the Southern District of Iowa.

The above cases, Nos. 4885 and 4886, being an appeal and cross-appeal, are argued as one case under the rule, the plaintiff below having the opening and closing of the oral argument, and on application of counsel the time of argument is enlarged to two and one-half hours to each side, whereupon argument was commenced by Mr. Burton Hanson in behalf of the Chicago, Milwaukee and St. Paul Railway Company, et al., continued by Mr. J. L. Parrish and Mr. F. W. Lehmann in behalf of the Des Moines Union Railway Company, et al., and the hour of adjournment having arrived the further argument is postponed until tomorrow.

(*Order for Submission in Both Causes.*)

May Term, 1917, Friday, May 25, 1917.

These causes having been called for further hearing, argument was resumed by Mr. F. W. Lehmann in behalf of the Des Moines

Union Railway Company, et al., and concluded by Mr. J. L. Minnis in behalf of the Chicago, Milwaukee and St. Paul Railway Company, et al.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(Opinion in Both Causes.)

United States Circuit Court of Appeals, Eight Circuit, May Term, A. D. 1918.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa, May Term, A. D. 1918.

No. 4886.

DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Mr. Burton Hanson (Mr. J. C. Cook was with him on the brief), for Chicago, Milwaukee & St. Paul Railway Company, and

Mr. J. L. Minnis for Wabash Railroad Company, Appellants in Nr. 4885 and appellees in No. 4886.

Mr. J. L. Parrish and Mr. F. W. Lehmann (Mr. W. E. Miller was with them on the brief), for Appellees in No. 4885 and Appellants in No. 4886.

Before Hook, Smith and Stone, Circuit Judges.

STONE, *Circuit Judge*, delivered the opinion of the Court:

This is a bill by the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company against the Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son. The complainants are railways passing through the city of Des Moines, requiring the use of terminal and depot facilities. Defendants are a terminal company at Des Moines and the individual owners of five-eighths of its outstanding capital stock. Complainants, except for eight qualifying shares, own the other three-eighths of such stock, the Wabash one-eighth, and the Milwaukee two-eighths. Complainants are now using the facilities of the terminal company under a thirty year contract, dated May 10, 1889, but related back to May 1, 1888, and expiring May 1, 1918. As holders of the stock control in the terminal company, the Hubbells have declared that if complainants desire to use the terminals after the above date they can do so only under such contract as may be maed therefor. Believing that they have (aside from stock holidngs) controlling interests and rights in the terminal property, complainants have brought their bill. The main object of the suit is to have determined the rights of the three companies in respect to the terminal property and operation. A subsidiary but not unimportant controversy is present regarding the right to several hundred thousand dollars accumulated from rentals, privileges and switching service by the terminal company, not arising from the use by or service to the complainants.

The complainants allege that they are the real owners of the terminal property and that defendant company simply holds the title in trust for them; or that the terminal ownership is subject to an easement in their favor which gives them the right to use the property in perpetuity for terminal purposes, upon payment of the actual cost of operation, maintenance and taxes.

The claim of the defendants is that the defendant company is the sole owner of the entire title to the terminal property, and also that complainants are estopped from questioning such title.

The decree of the court below adjudged that the defendant company had complete title to the terminal property, and that complainants had no interest therein except as stockholders of the defendant company. But the court held that, growing out of provisions in that company's articles of incorporation, it owed to complainants

and their successors a corporate obligation to furnish them terminal service upon equitable terms, and that such obligation was paramount to any obligation to serve other roads. From this latter provision in the decree defendants have prosecuted a cross appeal. As to the accumulated earnings, the court below held that this fund belonged to the defendant company, and that the complainants had no interest therein, other than as shareholders in the defendant company. Complainants have appealed from the entire decree.

The determinination of the main controversy is the definition of the legal effect of certain instruments and acts of the parties or their predecessors in interest. The determination of the right to the accumualted earnings depends upon the construction of the contract (dated May 10, 1889) under which the parties are now operating.

The Main Controversy.

A brief history is essential to any proper understanding and determination of the case. As to that part of their respective railways entering Des Moines, the Milwaukee is the remote successor of the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, while the Wabash is the remote successor of the Des Moines & St. Louis Railway Company. Prior to 1881 the Wabash, St. Louis & Pacific Railway Company was the owner of a railway line extending from St. Louis northwesterly to Albia, Iowa, about sixty-eight miles southeasterly from Des Moines. J. S. Polk, J. S. Clarkson, F. M. Hubbell and J. S. Runnells were at the same time interested in a short narrow gauge line, the Des Moines Northwestern Railway Company, extending northwesterly from Waukee, a town about fifteen miles westerly from Des Moines. Desiring to connect these lines at Des Moines, the Wabash and the above individuals entered into a contract December 8, 1880, providing for the organization by these individuals of a new company, the Des Moines & St. Louis Railway Company, and the building by it of a standard gauge line from Albia to Des Moines, with funds furnished by the Wabash Company. On the same day the Wabash Company entered into contract with the Des Moines Northwestern Railway, with the expressed object of increasing and securing the "through" traffic of that line.

This it sought to do by agreeing to furnish funds for the extension of that line northward and westward, and by agreeing to provide a connection from Waukee with the contemplated Des Moines & St. Louis Railway tracks to be laid in Des Moines. In April, 1881, yet another company, the St. Louis, Des Moines & Northern Railway Company, was organized by the above individuals, and soon began constructing a narrow gauge line from the northwest to Des Moines. A part of this line formed a link between Waukee and Des Moines, over which the Northwestern shortly thereafter secured running rights.

During the year 1881 and thereafter, the acquirement of right of way in Des Moines and the construction work there proceeded, the land being taken in the name of James F. How; James F. How, Trustee; G. M. Dodge; St. Louis, Des Moines & Northern Railway Company; or the Des Moines & St. Louis Railway Company. That taken by How, or How, Trustee, being paid for by the Wabash.

With the three lines entering or about to enter Des Moines and the land being acquired for terminals, the time and necessity for some terminal arrangement had arrived. The contract of January 2, 1882, was executed by the three railways and by the individuals (Dodge and How) in whose names part of the land had been taken. This contract is the basis of complainants' claims upon the main issue in the case. They contend that titles and rights defined therein remain unchanged in essentials. Defendants claims later departures radically affected such titles and rights as are to be found in the contract.

This contract, omitting signatures, was as follows:

"This Agreement made at the City of New York, the second day of January, 1882, by and between the Des Moines and St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, and the several individual signers hereto, Witnesseth:

"First. The Companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance at their joint expense for terminal facilities in the City of Des Moines to be held and used in common as hereinafter provided.

"Second. In pursuance of said agreement, various purchases have been made of real property in the City of Des Moines in the name of James F. How, individually, James F. How, Trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines and St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

"Third. It is mutually agreed by the parties above named, that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines and St. Louis Railway Company and one-quarter by each of the other two companies above named. It is understood that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

"Fourth. The title to said property shall be and remain in a trustee to be named by agreement by said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.

"Fifth. The individual signers hereto hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quit claim and convey the same to said trustees upon demand and reimbursement.

"Sixth. The Des Moines and St. Louis Company, shall at all times be charged with the police control, supervision and maintenance of said property, and the expense thereof shall be apportioned between it and the said other two companies, and the apportionment to be determined by the use thereof which they shall respectively make as evidenced by the wheelage; payment of the sum required to be made monthly to the Des Moines and St. Louis Railway Company, within ten days after rendition of an account stated.

"Seventh. The control of said property by the Des Moines and St. Louis Railway Company shall not extend to a determination of the character and extent of improvements to be now or hereafter put upon the same, but differences between the parties under this head shall be settled by arbitration.

"Eighth. It is understood and agreed that spur tracks shall be built connecting the said terminal grounds with such manufactories and other sources of trade in and about the City of Des Moines, as afford sufficient opportunity for profit by so doing, and that all of said tracks shall be adapted for use for both broad and narrow gauge trucks, provided that in case either of said Companies shall deem the construction of any of said tracks as not advantageous to its business, the question of constructing said track, and which of the parties hereto shall pay therefor shall be determined by arbitration.

"Ninth. Taxes and assessments levied upon said property shall be charged to maintenance account.

"Tenth. In the event that any Company, whose railroad does not extend to Des Moines, shall effect an arrangement for running its trains into Des Moines over the railroad of either of the parties hereto, such Company shall be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and its proportion of the maintenance account, the rental to enure to the companies hereto in the same proportion as the original outlay, and the sum due from such Company for maintenance account, to be determined in the same manner as the sums due from the other Companies, parties hereto. Railroad Companies whose roads extend to Des Moines, may be admitted to the use of said facilities by agreement of all the Companies parties hereto.

"Eleventh. All differences arising under this agreement shall be referred to arbitration; one of said arbitrators shall be chosen by the Des Moines and St. Louis Railway Company, another by the St. Louis, Des Moines & Northern Railway Company, and the third by the two thus selected.

The judgment of any two of the said arbitrators shall be final. If the matters of difference shall be between the Des Moines and St. Louis, and the Des Moines Northwestern, then the second arbitrator

shall be chosen by the Des Moines Northwestern, and not by the St. Louis, Des Moines & Northern.

"Twelfth. It is mutually understood that the grounds so to be held in common by the Companies, parties hereto, are all east of Farnham Street in the City of Des Moines, and that no grounds west of Farnham Street have been acquired under this agreement."

An analysis of this contract shows a statement of the occasion and object of the contract; provisions for the title, the use and occupation; the maintenance and the improvement of the property; and for arbitration.

The occasion and object of the contract is stated to be to provide for the common holding and use by the three companies of the property and improvements then or thereafter acquired or constructed for terminal facilities.

As to title, the property was "to be held in common" (Par. Twelfth) through the medium of a trustee to be selected by the companies, in whom the title should "be and remain * * * subject to the joint use and occupation of all of said Railway Companies upon the terms herein described" (Par. Fourth). If outside railways effected arrangements to enter Des Moines over any of the three lines they should, beside a portion of the maintenance cost, pay a fair rental "to enure to the Companies hereto in the same proportion as the original outlay" (Par. Tenth). The individual "signers hereto" declared the property acquired in their names to have been "upon the trusts above referred to', and agreed "to quit claim and convey the same to said trustee upon demand and reimbursement" (Par. Fifth). Payment for the property was to be borne by the three companies in proportions of one-half by the Des Moines & St. Louis and one-fourth by each of the other companies, with a provision that if a depot company should be organized and should take permanent charge of the property, that "said company may issue and deliver to the companies, parties hereto, its mortgage bonds to the amount of their respective portions" of expenditures for the property. (Par. Third.)

The use and occupation of the property was to be "joint" (Par. Fourth) under the "police control" and "supervision" of Des Moines

& St. Louis (Par. Sixth). Industrial spur tracks which might be built should be adapted to both standard and narrow gauge (Par. Eighth). There was provision for the use of these terminal facilities by outside companies. If such company did not extend to Des Moines, but should effect an entrance by a running arrangement over any of these three lines, such company should be entitled to the use of all the terminal facilities upon payment of a fair rental and its proportion of the maintenance account. Other railways might "be admitted to the use of said facilities by agreement of all the parties hereto" (Par. Tenth).

The maintenance of the property, including taxes and assessments (Par. Ninth), was to be in charge of the Des Moines & St. Louis, the expense to be divided on a wheelage basis and paid monthly to said company on rendition of accounts therefor (Par Sixth). Any other company entitled to use the terminals under Paragraph Tenth to bear its wheelage proportion (Par. Tenth).

Regarding future improvements, the contract provided they must, in character and extent, be such as agreed upon by the three companies, or if a disagreement, such as determined by arbitration (Par. Seventh and Eighth). The cost of such to be paid one-half by the Des Moines and St. Louis and one-fourth by each of the other companies (Par. Third), except that arbitration might settle which of the companies should pay for the industrial spur tracks, the construction of which had been opposed by one of the companies as not advantageous to its business (Par. Eighth).

Obviously the only purpose of including the individuals, Dodge and How, in the contract was to control the title taken in their names. They figure in the future of the plan, as outlined by the contract, only for the purpose of conveying their title "to said trustee upon demand."

Also there is mention of a "Depot Company." Under the influence of a knowledge of what was afterwards done, there is danger of exaggerating this reference. Clearly it was rather incidental. Its physical location in the contract is significant of the place it occupied in the minds of the parties at the time in connection with the contract. The contract is carefully drawn by skilled draftsmen, who set off in brief, clean-cut, numbered paragraphs the different subjects of the contract. If the "Depot Company" had bulked large in their contemplation at that time, or if it was to form any essential part of their then plan, it is strange it did not receive some separate and distinct consideration. In fact, it occurs in the paragraph which sets forth the proportions in which the companies are to bear the expense of acquiring and improving the terminal property. Its obvious connection with that idea is that it contains the only suggestion of any method of reimbursement for such outlay. In our judgment, that was the only reason for mentioning, in the contract, the matter of such a company. Even as expressed, while it shows that the subject of such a company had been considered, it also reveals that either the project had not reached the stage of completion and concurrence, or that everything regarding it was purposely left in complete abeyance, in so far as this contract is concerned. The expres-

sion is that such a company "may be organized" * * * may take permanent charge of the property * * * may issue and deliver to the companies * * * its mortgage bonds * * *."

As to the companies, the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. The title contemplated was a trust. The legal title to be "in a trustee to be named by agreement of said companies." The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor. While this proportional interest is not set forth in so many words, it is necessarily inferred from the combined circumstances that the companies were to pay therefor and for improvements thereto in proportion of one-half, one-fourth and one-fourth (Par. Third), and that the only possible source of profit then contemplated or provided for (rental from any tenant company) was to enure to the three companies in the same proportion (Par. Tenth). But there was to be no proportional limitation of usage. There was to be a "joint use and occupation of all of said Railway companies" (Par. Fourth). Nothing in the entire contract hampers the complete independent individual occupation and use of all the terminal facilities at all times by each of the companies except the two provisions that the occupation and use shall be "joint" (Par. Fourth), and that the Des Moines & St. Louis shall be charged with the "police control and supervision" thereof (Par. Sixth). It was apparently intended that each company should do its own terminal work with its own men and equipment. The only other precedence given either of the companies was the necessary one of "maintenance", with which the Des Moines & St. Louis was also charged (Par. Fourth). In short, the three companies gave up independence of title and of action in the occupation and use of the property only in so far as was absolutely necessary to what they then considered a safe joint occupation and use.

But whatever may have been the importance of a depot company in the minds of the contracting companies at the time the contract was executed, such (defendant herein) was incorporated under the Iowa statutes on December 10, 1884. However, conveyance to this new company, and acceptance by it, affecting the existing terminal property, although first authorized by resolutions of the four companies January 1, 1885, did not begin until November 7, 1887, nor end until April 28, 1888. The actual management of the property by the terminal company did not commence until May 1, 1888, up to which time the companies occupied and used it in common under the 1882 contract.

What the effect upon the title, control, use and occupation of this terminal property had the formation of this terminal company and these conveyances of the property formerly owned, occupied and used by the railway companies under the 1882 contract? This involves consideration (in the light of attendant acts and circumstances) of the Articles of Incorporation of the terminal company, the resolutions of the four companies in reference to the conveyances, the conveyances themselves, and an attempted amendment of the articles of incorporation.

The only official action taken by any of the railway companies concerning and prior to the incorporation of the terminal company was a resolution of the Board of Directors of the Des Moines Northwestern Railway Company on December 9, 1884, (the day preceding the incorporation). This resolution declared "it is desirable that a corporation be organized for the purpose of taking and holding" the property covered by the 1882 contract. It then chose its representatives "to act for this company in the organization of such corporation, and they are selected to act as two of the directors of said proposed corporation so to be organized for the purpose of carrying out the objects of said contract of January 2nd, 1882." December 10, 1884, all of the parties to the 1882 contract met for the purpose of incorporating the defendant company, General G. M. Dodge appearing both for himself and for the St. Louis, Des Moines & Northern, two individuals representing the Northwestern and two the Des Moines & St. Louis. The sole business of the meeting was the passage of resolutions referring to the articles of incorporation. The resolution of adoption declared "that for the purpose of carrying out the objects and purposes of the agreement heretofore, to-wit, on the 2nd day of January, 1882, made and entered into by and between the Des Moines & St. Louis Railroad Company and others (which is set out in full in the following Articles of Incorporation)", that the articles be adopted as follows:

"Articles of Incorporation of the Des Moines Union Railway Company.

"Whereas, The Des Moines & St. Louis, the Des Moines Northwestern and the St. Louis, Des Moines & Northern Railway Companies have been engaged in the construction of railways converging at Des Moines, Iowa, and have secured certain franchises, purchased certain realty and made certain improvements thereon—which they have heretofore agreed should be secured, purchased, made and maintained upon certain agreed conditions, at their joint expense—in accordance with a contract made and entered into by and between said companies and Grenville M. Dodge, and James F. How, Trustee, bearing date January 2nd, A. D. 1882, and which contract is in words and figures as follows, to-wit:

[Here the contract was set forth.]

"Whereas, each of said Railway Companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said Companies, and

"Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was the understanding of the parties that such Company might acquire, operate and maintain said property in such manner as best to serve the interests of the parties hereto.

"Now, Therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following:

"Articles of Incorporation.

Article 1.

"The name of the corporation shall be the Des Moines Union Railway Company, and its principal place of transacting business shall be Des Moines, Iowa.

Article 2.

"The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight-houses, railway shops, repair shops, stock-yards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars from the line or depot of one railawy to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I, of Title IX. of the Code and the amendments thereto. All the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, The St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, Trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise dispose of the use of any part of its franchise to any other Railway Company—provided that the assent in writing of the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company and The St. Louis, Des Moines and Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

Article 3.

"The capital stock of this corporation shall be One Million ($1,000,000.00) Dollars, which shall be divided into shares of one hundred ($100.00) Dollars each, and shall be paid in at such times and in such manner as the Board of Directors may determine, and the Board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwest-

ern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.

Article 4.

"The affairs of the Company shall be managed by a Board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of each year. The provisional Board of Directors, who shall hold office until the first Thursday in January, A. D. 1886, shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnells, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

"Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St, Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the Board unless so nominated.

"The fact that a candidate has been duly nominated shall be certified to the Stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.

"The provisions herein with respect to nomination for the Board of Directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the Board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, The Des Moines Northwestern Railway Company and The St. Louis, Des Moines and Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the Board of Directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the Stockholders as hereinbefore provided.

"The Directors shall elect, from their number, a President, Vice President, Secretary and Treasurer. All vacancies arising from the death or resignation of a member of the Board shall be filled by the Board.

Article 5.

"The President, Vice President, Secretary and Treasurer, shall possess the powers and discharge the duties of like officers of similar corporations, subject to the limitations imposed by these Articles. The officers, hereby constituted, who shall hold their places until the first Thursday in January, 1886, or until their successors are duly chosen, shall be as follows:

President .....G. M. Dodge.
Vice-President .....Jas. F. How.
Secretary & Treasurer....F. M. Hubbell.

Article 6.

"The private property of Stockholders shall be exempt from liability for corporate debts and undertakings.

Article 7.

"The highest amount of indebtedness to which the corporation may at any time subject itself shall be the amount authorized by law.

Article 8.

"Meetings of the Board of Directors may be called by the President, or, in case of his absence or disability, by the Vice President, and shall be called upon request preferred in writing by two members of the Board.

Article 9.

"These Articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of the stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the Company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the City of Des Moines, Iowa.

Article 10.

"This corporation shall commence on the Fifth day of December, A. D. 1884, and continue fifty years, with the right of renewal."

That the creation and entrance of the terminal company into the arrangements of the parties had a marked influence is certain. Here was a creature of the companies, brought into being for the cardinal purpose of taking, by some sort of title, this terminal property, improving, maintaining and operating it. No title was conveyed in the articles of incorporation. Had nothing further been done the title, control and operation of the terminal property would have been unaffected. But these articles are valuable as throwing light upon the intention of the parties as to the place that company was to have in their terminal plans. These articles contain provisions in addition to such as would have been necessary in the mere

creation of a terminal company—to such as would have been employed by outsiders whose only purpose was to engage in a terminal business. It is in these exceptional provisions that the particular intention of these parties is to be found. The articles include what may be called a "preamble", which, after reciting the occasion of the 1882 contract, the contract in extenso, and the expenditure of money in pursuance thereof, makes its sole reference to the terminal company as follows:

"Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was the understanding of the parties that such Company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto;"

declares that "for the purposes aforesaid, as well as for those hereinafter expressed, they associate themselves in a body corporate, and adopt the following:

Articles of Incorporation."

The clear statement in this preamble reference is that the parties intend the terminal company "to take permanent charge of the property" and "to acquire, operate and maintain said property" in such manner as best to serve their interests.

In what we may call the articles proper we find certain provisions which reveal the intention of the railway companies, not only to keep the stock ownership (seemingly contemplated in the authority given the Board of Directors "to receive in payment therefor the property and franchises in Des Moines, now held" by the railways and individuals, parties to the 1882 contract), but to exercise a control over the property and over the actions of the terminal company beyond such as would spring from stock ownership alone. Our immediate inquiry has no concern with the legality of these exceptional limitations if attacked in a proper way, but, taking them as they are, what light do they throw upon the intention of the parties?

Such control may be roughly classified into three kinds: (*a*) the requirement that the board of directors should be nominated by the three companies (treating the Wabash as identical in interest with the Des Moines & St. Louis) (A-4); (*b*) requirements relating to the disposition of the use of any part of its franchises to any other railway company (A-2), to the creation of any limitation upon such franchises (A-4), to the creation of any permanent charge upon the property (A-4); and (*c*) a broad requirement that all of the powers of the corporation shall be exercised "in accordance with the terms and spirit" of the 1882 contract (A-2).

The first of these three classes (*a*) shows the method of controlling the board of directors. Aside from any previous contract, the railways might want a provision perpetuating in them the choice of directors, and the only connection in thought with the 1882 contract

suggested by this requirement is in the circumstance that each railway company was to choose directors in proportion to their interest in the property under that contract. If the selection of directors were to depend entirely upon the vote of the stock, there was no assurance that two of the railways might not combine their votes and exclude the third from any voice in the active management. Therefore, they sought to assure not only complete control of the board, but the same representation upon the board as each of them was to have in the property under the existing contract. The idea also doubtless being in their minds that the stock which paid for that property would be similarly divided.

The second requirement (*b*) shows the method intended to preserve the control of the railway companies over the property and franchises acquired by the terminal company. Without the previous approval of the three railway companies no disposition of the use of any part of its franchises could be made to any other railway company, nor could any permanent charge be placed upon its property.

Passing from these specific provisions, looking toward the control by the railway companies of the management, franchises and property of the terminal company, we approach the general requirement (*c*) that "all the powers" of the terminal company shall be exercised "in accordance with the terms and spirit" of the 1882 contract. What does this mean? Evidently a limitation upon the exercise of the corporate powers. Subject to the limitations above discussed, those powers were such as ordinarily belonged to a corporation organized under the Iowa Code for pecuniary profit to construct, own and operate a terminal railway, with all of its attendant depots, warehouses, shops, etc. What, then, were the further limitations carried by this reference? How was the free exercise of these powers of the terminal company in constructing, owning and operating a terminal, to be limited by the terms or spirit of the contract? The terms and intent of the contract as to construction were that there should be only such improvements and extensions as were agreed upon by all the three railways, or settled by arbitration, and to be paid for (except as to certain industrial spurs) by the three on the basis of their contemplated interests in the property of one-half, one-quarter and one-quarter. The contract terms and intent as to ownership were a trust. The contract terms and intent as to operation were that each company should do its own terminal work under the police control and supervision of the Des Moines & St. Louis. Under the contract the cost of maintenance (including taxes and assessments) was on a wheelage basis. Under the contract the use of the facilities by other roads was to require agreement of all three roads, except that any other road entering Des Moines over the tracks of any of the three railways might use them on payment of rental to the roads and a wheelage part of the maintenance.

It is clear that all of these terms and intentions neither were intended to nor could survive the introduction of the terminal company. It is also clear that some of them were to remain active. It is impossible from the two instruments alone (contract of 1882 and

articles of incorporation), read in the light of their history, to draw a line in this particular which is at all points clear and definite. Some things, however, seem distinct. Touching operation, it is conceded by all parties to this suit that the plan of the contract that each of the railways should do its own terminal work over tracks in joint use was dangerous and unworkable. Doubtless this was one of the main underlying necessities for a terminal company which could, with its own engines and men, do all of this terminal work. Each of the companies was to have terminal facilities, but in a different method from that covered by the contract. The idea of a joint usage in the sense of a right in each of the three railways to make an individual usage of the same property during the same period had been found unsatisfactory and abandoned for the better plan. The contract plan of operation was to be replaced in its entirety.

As to ownership, no title or interest in the property owned or held by all or any of the parties to the contract passed or was affected by the articles of incorporation. It is quite clear, however, in the articles that the parties intended in the future to turn over that property to the terminal company. What was to be the character of the title or interest they intended to convey? There is no dispute in this case that as much as the bare legal title was to go. Was the full beneficial interest also to pass? When the parties made the 1882 contract, which provided for a trust, they also revealed therein that a terminal company had been under discussion. In an almost incidental way that matter was mentioned in connection with payment for the property covered by the contract. This mention was that such a company "may issue and deliver to the companies parties hereto its mortgage bonds, to the amount of their respective portions of the costs of said purchases and improvements." Why issue and deliver the bonds unless they carried value? Why issue and deliver them, except for some value in return? In short, the idea in the contract was compensation or reimbursement. The compensation or reimbursement was to be for money paid out for the legal title and the beneficial interest in the property. The only thing which the parties then had in view to give value to a mortgage and its bonds was this same property. Clearly the parties had considered before and at the time of the contract that the plan first to be tried might give way to that of a terminal company, and that such company might acquire the entire title to the property. Coming to the articles, we find no change in this conception. The preamble recited that "it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto." Nothing is said regarding the use of mortgage bonds, but Article 3, dealing with capital stock, authorized the directorate of the new company "to receive in payment therefor the property and franchises in the City of Des Moines now held by" the parties to the contract. What other than the beneficial interest in this property could have constituted in any real sense "payment" for the stock? Article 4 required the consent of all three companies before any "permanent

charge" could be placed by the terminal company upon the property. Thus the plan, so far as revealed by the articles, seemed to remain as suggested in the contract, with the additional idea of a payment in stock. In short, the complete title to go to the company, with the terms of payment not definitely settled, but suggestions of the value in bonds up to the outlay (in the contract) and of the capital stock of the company (in the articles).

As to maintenance: There is but one direct statement, and that is the one from the preamble quoted above. As to where the funds are to be secured therefor, there is no suggestion, unless we can infer that the plan of the contract is to prevail, or that indebtedness may be incurred therefor.

As to the use by other railways: There is the provision that the company shall have no right, without the prior written consent of the three railways, "to lease or otherwise dispose of the use of any part of its franchises to any other Railway Company."

Summarizing, the intention of the parties as revealed by the articles of incorporation shows a development of the terminal plan, changing, but not entirely abandoning, that of the 1882 contract. The continuing influence of that contract is evident, though the limits of that influence are not in all respects clearly defined. As to operation, it is evident that the general agency thereof was to be entirely different from that contemplated by the contract, but there is lack of certainty as to the influence of the contract over the action of this new agency. As to title the intention is clear. As to improvement and maintenance there is indistinctness.

The conduct and acts of the parties during the next few following years gradually clarified, crystallized and consummated the entire plan. The intention that the entire title to the property should pass to the terminal company had been suggested in the 1882 contract and adhered to in the articles of incorporation of that company. It was to be further emphasized in resolutions of the four companies relating to the transfers of the title. It was to be consummated in those conveyances. The plan as to improvements, maintenance and operation of the property in the hands of the terminal company, which had been so dimly outlined in the charter requirement that the powers of the terminal company should be exercised "in accordance with the terms and spirit" of the contract, obviously needed further and clearer definition. The 1882 contract was most general in its provisions and it applied to a situation in which a terminal company had no place. No one could determine what the "terms and spirit" of the 1882 contract meant as applied to the management of the terminal company. Very soon after the terminal company took control of the property the parties dispelled this uncertainty by a supplemental contract explaining clearly what they meant in that regard by the "terms and spirit" of the 1882 contract. This was the contract of May 10, 1889, related back to the date the terminal company took control (May 1, 1888), and covering a term of thirty years. It completed in a workable manner the terminal plan. While all important in the other branch of this case, this last contract is no more than a side light upon the main controversy which

pivots upon the character of title in the property conveyed to the terminal company.

The first step toward a transfer of title was the action by stockholders' meetings of the four companies, all held January 1, 1885. At these meetings the railway companies (each reciting that the terminal company had been "organized as contemplated and provided in the aforesaid contract, to acquire, hold, use and enjoy the real estate, property rights and franchises in the City of Des Moines * * * of the aforesaid railway companies and signatories of said contract acquired and held thereunder, and to carry out the purposes of the said contract") ratified and accepted the articles; undertook "to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of" the terminal company and authorized its proper officers

"upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled under said contract to convey, assign and transfer to said company all its right, title and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines East of Farnham Street in said City now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract."

Upon the same day the terminal company, at the first meeting of its Board of Directors, appointed a committee

"to confer with the several parties to said contract and agree with them severally upon the terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this Company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this Company with the title, control and management of said properties as provided for in said contract of January 2nd, 1882."

It also directed the issue of not to exceed all of its fully paid capital stock and not to exceed 500 bonds of $1000.00 each, secured by mortgage on "all of said property so to be conveyed to this Company or thereafter to be acquired." This stock and these bonds were "to enable this Company to pay for the property and to maintain, operate and improve the same, and purchase other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same." With the provision that when the above committee "shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this Company necessary to be delivered to them and each of them, in payment for said railroad property and franchises," and shall have delivered the same "on receipt of the conveyances and assignments of said property so to be made to this Company," the remainder of the bonds and stock shall be issued from

time to time as needed only for the above purposes. Deeds in compliance with these resolutions were not made until beginning with November 7, 1887, and ending April 28, 1888. Nor did the terminal company take possession and operate that property until May 1, 1888, after the last of these deeds, although two of the three railway companies had at these same January 1, 1885, meetings, voted to at once "transfer the management and operation of its property in Des Moines" to the terminal company, expressly leaving the settlement as contemplated by the other resolution to be arranged later, and although the terminal company at its meeting that day assumed to take immediate charge. It is not shown in the record why there was this delay in executing the deeds, although counsel suggest it lay in the confusion attending the passage through financial difficulties of the Wabash & Pacific, the largest single force in the terminal arrangement.

November 1, 1887, the terminal company, at a stockholders' meeting called "for the purpose of considering the question of amending the Articles of Incorporation of this Company, and issuing bonds of the Company for the purpose of raising money to purchase, construct and improve its railway and property", increased its capital stock to $2,000,000.00, (without changing the authorization to receive therefor the properties in payment) and authorized the issue of not over $800,000.00 bonds, "secured by mortgage or deed of trust on the property of this Company, and the same or the proceeds thereof to be used in purchasing and paying for its property and improving the same, and building its railways, depots, round-houses and shops, and making other improvements."

Within a week later the directorates of the four companies passed practically identical resolutions in reference to the transfer of the property taken in the names of Dodge and of How. The substance of these resolutions was a request to How and to Dodge "to transfer to" the terminal company the property so held upon receipt of stipulations to deliver to each of them as soon as practicable "first mortgage bonds of that company to the amount of the money advanced for the payment of said property and improvements with interest on same and taxes paid thereon", and the capital stock of the company. The stock to go one-fourth to Dodge and three-fourths to How, the latter to transfer the stock and bonds coming to him to the purchasing committee of the Wabash "in lieu for the money advanced by said Company to make the purchase of above property and improvements, and the payment of taxes for this company."

In addition the Des Moines & St. Louis authorized its officers to execute a deed to the terminal company "conveying to it all its real estate rights of way, franchise, road-bed and other property of said company lying and being in the City of Des Moines, east of Farnham street", no matter how acquired. This being done "for the purpose of carrying out the contract of date January second, 1882."

On the same day, upon receipt of formal notices of the above resolutions passed by the railway companies, the terminal company, at a directors' meeting, accepted the above action of the railway com-

panies, authorized the delivery of the stock and bond warrants, the execution of the mortgage and issue of bonds.

All of the above resolutions were passed at stock or directorate meetings of the companies. The entire membership of the terminal company was selected by the railway companies and undoubtedly simply registered their will. The resolutions emphasize and confirm the statements made above as to the intention of the railways (revealed in the contract and the articles) that the entire title should pass to the terminal company and be paid for by stock and bonds of that company.

In pursuance of the resolutions, How and Dodge delivered deeds. There were three from How covering different pieces of property. The first two were identical in form. Omitting legal description of the property they were as follows:

"James F. How, Trustee,

to

Des Moines Union Ry. Co.

Deed.

"Whereas, The property herein described was from time to time purchased with the moneys and funds of the Wabash, St. Louis and Pacific Railway Company a corporation; and Whereas for its convenience the legal title to said property was conveyed to me in trust; and Whereas said property was acquired and held for the purpose and upon the terms set forth in a certain contract made and entered into on or about the 2nd day of January, 1882, between the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company; G. M. Dodge, James F. How and James F. How, Trustee; and which contract was consented to by said Wabash, St. Louis and Pacific Railway Company; and Whereas I have heretofore at the request of said Wabash, St. Louis & Pacific Railway Company stated and declared in writing that I held the legal title to the real estate hereinafter described in trust for said Des Moines & St. Louis Railway Company and said Des Moines Northwestern Railway Company; and Whereas the Board of Directors of said Des Moines & St. Louis Railway Company and the Board of Directors of said Des Moines Northwestern Railway Company did, on or about the 8th day of November, 1887, pass certain resolutions containing among other things the following, to-wit:

"'Whereas, James F. How, has prior to 1881, and since then purchased certain property and made expenditures on same as Trustee for this Company, the money expended for said property being furnished by the Wabash, St. Louis and Pacific Railway Company; and Whereas, under an agreement with this Company, and the Wabash, St. Louis and Pacific Railway Company and others, it was intended that said property standing in the name of James F.

How, Trustee, should be transferred to the Des Moines Union Railway Company under certain conditions. It is hereby resolved, that James F. How is requested by this Company to transfer to the Des Moines Union Railway Company the property above referred to.'

"Now, therefore, know all men by these presents:

"That I, James F. How, Trustee, as aforesaid, of the City of St. Louis, State of Missouri, in consideration of the premises, and of the sum of One Dollar, to me in hand paid by the Des Moines Union Railway Company, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents I do hereby grant, bargain, sell and convey unto the said Des Moines Union Railway Company, the several lots or pieces and parcels of ground situated, lying and being in the City of Des Moines, County of Polk, State of Iowa, particularly described as follows:

* * * * * * *

"To have and to hold all and singular the several pieces and parcels of real estate aforesaid, with all the appurtenances thereunto belonging unto the said Des Moines Union Railway Company, a corporation, and its assigns forever. It is expressly understood, however, that I only undertake to convey such title as I may have in said premises, and that I only undertake to warrant and defend against those claiming through and under me."

The third deed substantially differed only in that the conveyance recited it to be by How "as Trustee aforesaid." The deed from Dodge was an ordinary quit claim. A few lots which had been taken in the name of the Northern were quit-claimed by a deed which conveyed the described lots,

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever."

Other property which stood in the name of the Des Moines & St. Louis was conveyed by general warranty deed. All of these deeds were recorded, so far as this record shows, on April 26, April 27, or May 1, 1888.

The mortgage authorized was dated November 1, 1887, acknowledged February 13 and 28, 1888, and recorded May 21, 1888 (three weeks after record of the last of the above deeds on May 1). There was never any deed from the Northwestern, which had no property standing in its name.

It is unprofitable to trace the different later steps connected with and leading up finally to the payment for the property by bonds covering the actual expenditures and stock totaling 4000 shares ($400,000.00).

With the passage of these deeds and consideration ends the history of the title. All of these transactions result as follows: An intention on the part of all parties that the entire title shall go to the terminal company; payment by that company of the full consideration therefor ultimately agreed upon; deeds designed to convey that full title.

But it is said that if the railways did so convey all interest in those necessary parts of their roads, such action would be void. The rule invoked is that public carriers will not be permitted to contract away their public usefulness by vitally maiming their lines. Rules of law extend no further than the basic reasons upon which they rest. The usefulness, if not the necessity, of terminal companies is established. That they must, as a general proposition, own their properties in order to raise funds to improve, maintain and operate them efficiently, is certain. The more efficiently and economically a railway can procure terminal facilities, the better and cheaper its services to the public should be. The conditions and compensation for use of such terminals by the railways is subject to public control, so that the railways cannot be denied or unreasonably restricted in such usage. The public service is protected. It should be bettered by such a terminal arrangement. Therefore, the rule invoked by plaintiffs has no application to disposition of terminal portions of a railway to a terminal company.

It is urged that the terminal company has, by its own statements, declared that it had no beneficial interest in the property. The statements intended are contained in reports made by that company to the Executive Council of Iowa for the years 1888, 1889, 1890, 1892 and 1893. In these reports the company stated that it was "simply a representative company, acting as an agency" for the railway companies, "performing all necessary work for them, and charging each at actual cost, its due proportion thereof incurred." These reports were made for purposes of taxation. During all of those years except 1892 and 1893 the entire income was applied in reduction of the bills of the railway companies, and for those two years it should have been so applied under the terms of the thirty-year contract, dated May 10, 1889. So that, in fact, it had no income which properly remained as its own. Again, if the use of the term "representative" is to be emphasized, it would be met by the terms "tenant" and "lessee," applied to the railway companies, in a contract dated July 31, 1897. This latter contract was between the terminal company and the complainants, or their predecessors. It applied to and affected the contract of 1889, under which the companies are and have been operating since very shortly after the terminal company began to control the property.

It is contended that complainants retained through the articles of the terminal company an interest in and control over the property.

As we have endeavored to show above, no interest was retained in the property through these articles of incorporation. The title was undisturbed and unaffected until the deeds transferred it. However vocal the articles of incorporation and the resolutions of the different companies may have been of the intention of the parties, these expressions passed into effective action only in the deeds. But the articles did provide for a direct control over the property by the railway companies. This was through the requirement that the prior consent of the railways was necessary before leasing or disposing of the use of any part of its franchises, or before placing any permanent charge upon the property, and the requirement that the railways, not the stock, should name the entire directorate. This control was purely contractual in its nature and neither sprang from nor gave rise to any legal estate or interest in the property itself affecting the full and complete title of the terminal company. When the deeds passed, the terminal company held the complete legal and equitable title to the property, though it had by contract restricted its freedom to lease, dispose of or incumber it.

The above control was later relinquished. April 8, 1889, there was an attempt to amend the articles. The result of the proposed amendments would have been to take from the railways, as such, all of the control given by the original articles; to substitute therefor a character of veto control by one-eighth of the stock; and to provide that, not all, as formerly, but 4000 shares of the capital stock should be paid the railway companies in addition to the bonds then already issued as the full purchase price of the property deeded by the railways. The railways contend that they were invalid because not properly adopted; and that, even if valid, they could not alter the relations between the railways and the terminal company, because such were based upon contractual rights which had become vested, and which the railways had not by formal corporate action consented to be altered.

The claim that the amendments were never properly adopted is well taken, but not open to complainants. The exact rights of anyone to any of the capital stock were not determined definitely until the contract of May 10, 1889, and no stock had been issued at all up to the date of the attempted amendments. However, the company had maintained an organization from its incorporation, December 10, 1884. This was not difficult, as the articles themselves provided for the nomination of the entire board by the railway companies; no other party had any interest in this terminal company or property; and it was not active in the control and operation of the property until May 1, 1888. But when the corporation undertook to amend its fundamental law, that could be legally done only by the stockholders. There was no stock issued; there was only a right to stock through the contract of 1889. This contract provided (Sec. 26) for the issuance of the entire authorized capital of $2,000,000.00 (20,000 shares), 10,000 shares to the St. Louis Company and 5000 shares to each of the other two companies. It appears from the same section of the contract that each company was to

stock qualify its own terminal company directors. With the three companies entitled to all the stock, and with none of it issued, the eight men (in person or by proxy), who had been selected by these companies as their choice for directors, met in a stockholders' meeting, claiming to represent one share of stock each. There is a statement in the minutes of that meeting that the railway companies "were also present" in the person of three of these men, who were respectively president or vice-president of each of the railways. It is not stated or claimed that such alleged representatives were there holding the proxies of the stock to which their respective companies were entitled, or that as such representatives they participated in any way in the meeting. *Nor is* it claimed that any of them had any authorization from his company (unless such adhered to his official position) to so be present or to represent it. At such a meeting the amendments were duly passed. Formal requisites of the Iowa law as to publication, etc., of corporate amendments were met.

Articles of incorporation have a dual character; they are at once a grant of authority and a contract. The matter of authority is between the state and the incorporators alone. The matter of contract, while always and primarily between the state and the incorporators, may include third parties, either actual or in prospect. Hawthorne v. Calef, 2 Wall. 10; Curran v. Arkansas, 15 How. 304; Woodruff v. Trapnall, 10 How. 190. The relation between such third parties and the incorporators or their combined entity, the corporation, is purely contractual. It possesses no different or higher attributes because its terms find expression in an instrument to which the state is also a party. Such contracts are subject to the ordinary rules of law governing contracts. It is, of course, evident that such third parties and the corporation could not alter such contract in any manner that would affect the rights of the other party, the state. Although there are additional reasons why this should be so where the state is a party to this character of contract, yet neither can two or three parties to any contract so alter their contractual relations as to affect the third without its consent. No reason appears why in this, as any kind of tri-party contract, two of the parties may not at will alter or annul any of such contract rights, if such action affects them alone. With such power to change their rights, the question becomes whether or not the terminal and railway companies have altered or annulled the rights arising from the contract contained in the articles of incorporation. They took no formal corporate action accepting or ratifying these attempted changes in their contractual relations with the terminal company. But all of the individuals who acted at this purported meeting of stockholders of the terminal company were chosen by the three railway companies and certainly were merely their instruments. There can be no question that the controlling, executive officers of the railway companies were fully aware of and approved the action of the meeting; that Hubbell was encouraged to purchase the bonds and stock; that the value of the stock was solely prospective during the existent

operating contract and that this value has largely increased as the worth of the terminals grew and the contract term diminished. Although the 1889 contract had provided for distribution between them of the entire capital stock of 20,000 shares they accepted, after the amendments, distribution of 4,000 shares provided therein. Before the amendments there had been no stock issued, but the corporate organization had been maintained by eight directors chosen by the three railways in accordance with and in the proportions prescribed in the original articles. After the amendments the directors were elected by the outstanding stock, and, in fact, they were not all representative of the railways; no attempt was made by the railways, as such, to exercise the very valuable right of naming, in certain proportions, the directors. The amendments provided that no stock beyond the 4,000 shares should be issued except by consent of more than seven-eighths of the stock. This provision has been observed. This was a very vital provision, bearing upon the value of the issued stock. It cannot be disputed that the virtual veto of further issue was for the benefit of Hubbell, who then owned one-eighth of the stock (bought less than two months before), and to whom the Wabash purchasing committee at that very time was endeavoring to sell another eighth (later consummated). At that time the terminal company was under contract with the railway companies to apply all of its surplus earning to a reduction of their service bills thus, during the life of that contract, depriving the stock of all chance of dividends. That contract had then twenty-eight years to run. Yet three days before this purported meeting of the terminal stockholders the Wabash purchasing committee offered Hubbell $100,000 of terminal bonds and one-eighth of the stock for $115,000.00 and accrued bond interest. This sale was consummated after the amendments had been adopted. The truth seems to be that the purchasing committee of the Wabash was desirous of realizing upon these bonds and stock by sale to Hubbell, who was the dominating influence in the other two railways; that Hubbell was willing to purchase if the control of the railways, as such, given in the articles was removed; the articles were amended, removing Hubbell's objection; the purchase was made. For seventeen years thereafter the railways acted in perfect harmony with the articles as amended. During all of that time there was no questioning of their validity. Not until this suit was filed in 1907 was there any such attack. The doctrine of laches comprehends and controls the situation. Neither as shareholders nor as parties contracting with the terminal company can the railway companies thus sleep upon their rights and then in a court of equity enforce such against others who have, to their knowledge, acted upon the belief that such rights did not exist and have acquired and hold property which has enormously increased in value in the interval. These amendments took away all control by the railway companies, as such, over the action of the terminal company. This would include the rights of approval by them of usage, transfer or permanent incumbrance of the property, nomination of directors and all influence of the 1882 contract as embodied in the articles of incorporation. All of these

provisions in the articles were for the exclusive benefit of the railways, and they could and did part with them.

Finally, it is urged that it cannot be supposed that these railway companies would bring into being a creature, put into its hands such ownership and control over their property and endow it with such powers that it and not they could command the situation. Such a supposition is improbable and here unnecessary. There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances. A very short trial convinced the railways that the 1882 contract plan was not safe nor practical in the use of the terminals. Under that plan as much control as they deemed proper had been vested in that one of them (Des Moines & St. Louis Railway Company) which was most largely interested in the property. The necessity of some neutral outside agency was evident. A close corporation in which stock and representation on the directorate was assured in proportion to their ownership of the property naturally suggested itself. The opportunity for reimbursing themselves for outlay in connection with the property was attractive. This could be done through bonds of a terminal company and yet leave the free use and entire control of the terminals. Such bonds must have value behind them, and there was no other value possible except the property. Also, they must acquire the stock of such company and must make payment therefor in value. So they created this agency; they circumscribed its powers with restrictions which made their control of it as complete as legally possible; they contracted among themselves, limiting the transfer of stock by any of them. They thus took every precaution consistent with the objects they had in mind which prudent men could devise to make their control over their creature complete and permanent. They then transferred to it their property and felt secure. For years so complete was this mastery that no stock of the terminal company was issued, although it had acquired the property, issued its bonds thereon, and had sole control over the operation of the terminals. But financial difficulties enmeshed the Wabash, the then holder of the largest interest (one-half) in the stock and bonds. One avenue of relief was through disposition of a considerable portion of such stock and bonds to an individual (Hubbell), who was then influential in the two other railways. Such a sale would seem in effect a mere rearrangement of the interests of the three companies in the terminal company. But it was a vital condition of that purchase, required by the purchaser, that the complete control of the railways over the terminal company should be lessened so that the purchaser might protect his interests. This was done. It was the severance of those bonds in which lay the control of the railways, as such, over the terminal company. Thereafter, through successive acts, natural enough and, at the time, apparently harmless, this removal of control was more completely confirmed. The ultimate result being the entire emancipation of the terminal company from outside government. In course of time a majority of the outstanding stock had passed legitimately

and for value to the Hubbells. Also, they had disposed of their interests in the railways (Northern and Northwestern) to the Milwaukee, retaining for themselves the terminal company holdings. These last two concurring factors inserted into the situation for the first time an unforeseen diversity of interests between the railways and the terminal company. Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them the exclusive ownership and control which they had at the beginning so much valued and so carefully guarded. The proprietorship and mastery of the entire terminal property, rights and franchises are represented by the outstanding stock and bonds of the terminal company. All of such stock and bonds are now held by the complainants or passed through their ownership or that of their predecessors and were parted with for value. They have not lost their property. They have the stock and bonds or the value they received for them. They have parted with all control not given by the stock or bonds.

Our determination upon the main contention in this case is that complainants, except as bond and stockholders, have no interest in the property of the terminal company and no voice in the control and management of that company.

Surplus Earnings.

In connection with the management and operation of the terminal properties, sources of income arose aside from the contributions made by the three railways. These sources were switching charges and rental of parts of its property or of privileges in connection therewith. Accumulations of this character now total several hundred thousand dollars. Complainants base claim therefor upon the contract entered into between the terminal company and the railway companies, dated May 10, 1889. The terminal company replies that the contract does not include such monies. The determination turns, therefore, upon the meaning of that contract. A subsequent contract of July 31, 1897, does not affect this controversy.

Those portions of the 1889 contract pertinent to this point are as follows:

"Section Three. Each of said parties of the second part for itself and its assigns, agrees to pay to said party of the first part a sum of money to be asecrtained as follows, to-wit:

"1st. There shall be ascertained the amount required to pay five per cent interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

"2nd. At the expiration of each month or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, round-houses, engine houses, etc., during the preceding month. And in like manner

there shall be ascertained the taxes, general or special, levied upon or against said property and paid during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the preceding month, or to be paid during the next succeeding month.

3rd. There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, round-houses, transfer and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in Section Nine hereof.

"Section Four. Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid to the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month; and it is expressly understood and agreed that in computing wheelage, three narrow gauge cars shall be taken as the equivalent of two standard gauge cars; and that the term 'wheelage' as used in this contract means that three narrow gauge cars are to be accepted as the equivalent of two standard gauge cars.

"Section Five. If the amount, or any part of the amount, due from any other railroad company or companies for the use of said property or any part thereof, shall not be paid when due, then the sum so due and unpaid shall also, on demand of said first party, be paid to it by said second parties on a wheelage basis as hereinbefore defined."

Section Nine, referred to in the above quotation, relates to a different basis of dividing round-house expenses and does not alter the meaning of the quotation.

The plaintiffs contend that these "Surplus Earnings" are made up of items which under the above provisions should have been credited upon their monthly bills. Defendants claim that the only character of credit items intended by these provisions were such as were paid by some other railway by virtue of a contract for the use of the property, and that these items fall without that definition. This latter contention is a strict construction of the exact wording of the contract. It is not in our judgment a fair construction of the spirit of the agreement. This conclusion is based both upon the history of the transaction and upon the meaning to be given this precise language when read in connection with the entire contract.

After the railways had, in April, 1888, transferred the property to the terminal company it was in a position to proceed to carry out its purposes. All of the parties (this for practical purposes

at that time meant the three railway companies) evidently realized that something more was needed to definitely define and control the relations of the four companies toward each other. One witness testifies that the moving considerations which led to this agreement were that the 1882 contract had made no provision defining how the interest upon the bonds should be paid, and that the railways thought that round-house services should not be paid for on a wheelage basis. Doubtless these two items were in the minds of the parties, but it is quite evident that there was something of greater importance. The very general statement in the articles of incorporation that the terminal company was to exercise all of its powers "in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882", was too vague to serve as a practical definition of the rights of the parties or as a guide to the terminal company in the conduct of the business of the railway companies. Besides it was vitally necessary to settle the terminal stock rights of the railways. Therefore the parties wisely determined, as set out in the preamble of the 1889 contract, that

"for the protection of the parties hereto and their assigns, it is important that the rights, duties and liabilities of each in regard to the whole subject matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined."

The contract of 1882 had provided a plan for financing the terminal project. This plan contemplated that the railway companies would provide the terminal properties; that the expenses of control, supervision, maintenance (including taxes) and (generally speaking) improvements should be met by them on a wheelage basis. They expected at that time to procure the service at cost and divide that cost in accordance with actual usage. This idea that the terminal service for which they were taking all these steps would be furnished them at cost passed into the 1889 contract. For several years after that contract became effective the monthly bills rendered by the terminal company and paid by the railway companies set forth specifically these items of rentals and switching charges from outside sources of credits upon the expenses, of which the balance was divided between the three railways on a wheeling basis. February 11, 1891, a director's meeting of the terminal company ordered

"that the rents collected for the use of the Company's real estate, and the switching charges paid in, be credited on the bills of the different tenant companies occupying this Company's terminals, giving to each Company its share ascertained by wheelage."

About a year later, January 7, 1892, the same body ordered a discontinuance of this practice. By its terms this discontinuance was intended to be temporary and was for the purpose of providing a fund "with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies." When the auditor of the Wabash noticed the absence of such credits from the bill for the month preceding the above last

order he inquired of the terminal company superintendent, who wrote as follows:

"Replying to yours of the 1st inst., in regard to the allowance for switching, rentals, etc., that should be made on our bills for the months of December and January, I have to say, that at a meeting of the Executive Committee, held January 7, 1892, it was decided not to distribute these collections for a period of time, until the Des Moines Union Railway Company could accumulate a small fund for working capital. I presume this will continue in effect until January, 1893. You will be furnished each month a statement showing the amount of this rental, *and your proportion of the same* (italics ours) os you can make a charge against the D. M. U. Railway and carry it on your books, as you see fit for future adjustment."

Also, in the annual report made by the terminal company to the Executive Council of the state of Iowa for taxation purposes for the years 1888, 1889, 1890, 1892 and 1893, was the statement that the terminal company was "simply a representative company, acting as an agency for" the railway companies, "performing all necessary work for them, and charging each at actual cost its due proportion thereof incurred." The report for 1894 differs in some other, but not in this respect, except that it includes another railway, and says that it "performs certain services for these companies and collects from them as rental and for such services, the aggregate amount of its expenses, which expenses are paid by the several railway companies in proportion to the use of the property and services rendered, as provided by contracts existing between this company," and the other companies. Thus the history of this provision of the contract, and of the view taken of it by the parties themselves before any antagonistic motives or interests had intervened, shows that all revenue of the terminal company was to be credited on the bills of the railway companies. A careful consideration of the entire contract itself leads to the same conclusion.

Therefore, the surplus earnings should be returned to the railway companies. For that purpose an accounting should be taken to determine what sum should go to each, calculated upon monthly wheelage basis.

Usage After May 1, 1918.

When the present operating contract is ended the rights of the parties respecting the use of the terminals by the railways are those which spring from their nature as carriers and their physical and business relation to each other as carriers in and entering a large terminal. These are that the terminal company must furnish its full terminal facilities in so far as reasonably necessary and required by the railways, and they will pay therefor such reasonable sum as may be agreed upon between the terminal company and each of the railways, or, in default of such agreement, as may be fixed by the proper public tribunal.

Conclusion.

The decree should be modified. It should state the complete title to this property in the terminal company, and that the only interest of the railways in the property or the management of the corporation is such as flows from stock ownership. That the surplus earnings belong to the railways, and a master should be appointed under instructions to ascertain the part due each upon a wheelage basis.

It is so ordered.

Filed May 23, 1918.

HOOK, *Circuit Judge*, dissenting in part:

I concur in the award to plaintiffs of what is called the surplus earnings of the terminal company, not only for the particular reason given but also for a broader one arising from the other branch of the case.

I am unable to agree to the foregoing opinion upon the main controversy and will state my reasons in a general way. The railroad companies organized the terminal company and invested it with the legal title to their property, including integral parts of railroad lines and appurtenant franchises, solely for the more convenient and better performance of their public duties. It is open to question whether the most important of the conveyances could lawfully have been made except for that specific purpose. That purpose was fundamental, not temporary or casual, and it determined the character of the terminal organization. The terminal company was not incorporated by individuals as an independent enterprise for personal profit and its stock was not put upon the market as that of a financial venture. The contract of 1882 between the railroad companies foreshadowed the terminal company in express words and when that company was chartered it took the place of the individual trustee provided for by the contract. That fact is too plain for discussion. The change to a corporate trustee was solely for reasons of convenience. It was one of method or form but not of underlying, essential substance.

As regards the legal title to the property, the terminal company became the trustee of the railroad companies that organized it and of such others as might thereafter be admitted to joint beneficial ownership. The beneficiaries present and future were what are commonly called proprietary or constituent companies. Each of them owed a duty to the others that it would not at any time so deal for itself or with its own proprietary interest as to impair or destroy the joint relation among them or the character of their common organization. Not only did the terminal company hold the legal title as trustee, but in the operation and maintenance of the property it was an agency of the proprietary companies for the performance of their railroad functions. This was accurately

expressed in a sworn declaration by one of the individual defendants in 1892 when president of the terminal company. He averred that it was "simply a representative company, acting as an agency at Des Moines for the Wabash Railroad Company and the Des Moines, Northern and Western Railway Company, performing all necessary work for them, and charging each at actual cost, its due proportion for the expense thereby incurred." The Des Moines, Northern and Western was the successor of two of the original proprietary companies.

In both aspects of its position towards the proprietary companies the terminal company was in a high sense their trustee; and according to salutary principles it was bound to maintain the integrity of that relation. Being itself a corporation, its fiduciary obligations and disabilities rested equally upon its officers through whom alone it could act. The limitations upon the right of a person in such a capacity to act for his personal benefit with respect to the subject of the trust are familiar. Never are they less than that the dealing must be open, avowedly at arm's length, and without contrivance or concealment. The individual defendants, one or the other or both, were, at all the times material in this case, officers and directors of the terminal company. The conclusion of my brothers, briefly stated, is that by a series of transactions occurring in a long course of years the original character of the terminal company was gradually changed into that of an independent corporation, and that the control of it was lost by the railroad companies and was acquired by the individual defendants who were its officers. But they say: "There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances." In other words, the proprietary companies were not cognizant of the trend of the circumstances, and the result held to follow, though unexpected and not intended by them, is enforced because of a legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circumstances relied on do not appear to me to have the significance attributed to them, but were it otherwise the presumption should not be so broadly applied to the case of a trust the destruction of which is claimed by those subject to the disabilities of trustees dealing for themselves. The excerpt quoted above touches the quick of this controversy. In my opinion the various transactions thought to produce a result so unexpected and unforeseen should be severally examined in the light of the surroundings at the time they occurred. If in one aspect they were then consistent, or not apparently inconsistent, with the frequent and studied declarations of the object of the terminal organization, and that view was then reasonably entertained by the railroad companies, that view should prevail in a court of equity rather than a shrewder one tending to a conclusion in favor of participants who were bound in good conscience to the contrary.

An argument is made upon the issue by the terminal company of bonds on the property and the necessity that it should have had the title to enable it to make the mortgage. Of course it had to have

title as complete as the giving of the mortgage required, but there is nothing in that inconsistent in any degree with the existence of a trust relation between it and the proprietary companies. The mortgage is still afoot, and in this case no rights are asserted under it. Its effect upon the question before us is not different from that of a joint mortgage by the proprietary companies upon properties severally owned by them but committed to a comomn use, or that of an authorized mortgage by an individual trustee named under the contract of 1882. The proprietary companies were fully justified in believing that the changes and amendments in the charter etc. of the terminal company now relied on as making for its complete independence, were for the sole purpose of giving it the conventional dress of a corporation that has put forth an issue of bonds. That was why suggestions originating within the terminal company were so readily agreed to by them, and that is why the result so contrary to their vital interests, now held to follow, was unforeseen. I question whether property and rights of great value are lost in that way except in circumstances concededly not present here. The very suggestion that a great railroad system, like the Wabash for example, had unintentionally and unexpectedly lost its proprietary interest and right to use extensive terminals in a large city, to the establishment and upbuilding of which it was a party and to which it had contributed property acquired for railroad purposes by eminent domain and public grant, is so unusual as to impose upon those who make it a heavy burden of law and fact. Questions like these naturally suggest themselves: Who got the property of the railroad company and deprived it of its right of entrance into the city? How did they do it? What were their relations to the railroad company? Who represented the railroad company in such an important matter and what authority did they have?

After the conclusion is reached that the terminal company had by gradual action thrown off its trust character and had become independent, attention is directed to the transactions in its stock. The power asserted by the individual defendants to control the terminal company and thereby to exclude the plaintiffs from the use of the terminals rests upon their possession of five-eighths of the issued capital stock. There is, however, abundant proof that the stock of that company was intended only to represent the interests of railroad companies actually using the terminal facilities and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable. I know of no public policy or rule of law against such a status of corporate stock or its enforcement as between the parties who established it. If it were formally expressed in the corporate charter the world would have to take notice. But as between the parties themselves, those participating and having actual knowledge, internal evidence may disclose it. It should always be in mind that in this case there are no innocent purchasers relying upon public records. The contract of 1882 specified the proportional interests of the three original railroad companies and foreshadowed the organization of the terminal com-

pany to take the place of an individual trustee. In 1884 the terminal company was organized for the expressed purpose of carrying out the contract. My brothers see in the articles of incorporation some evidence of a departure from the trust and the beneficial relations, but it seems to me that the intention to maintain them was asserted and reasserted as definitely and positively as words would permit. While, as customary, the charter made provision for a capital stock, the connection between the distribution and future ownership of such thereof as might be issued and the railroad use of the property was manifested not only in that instrument but afterwards in many ways by both the railroad companies and the terminal company. The limitations of an opinion will not admit of a recital of this evidence in detail. It is in the record and there is much of it. In 1887, three years after the terminal company was incorporated, when the parties began to convey to it the legal title, the directors of the predecessor of the Wabash Company adopted a resolution directing its president and secretary to execute a deed conveying "all its real estate rights of way, franchise, roadbed and other property of said company lying and being in the City of Des Moines, east of Farnham Street, whether the same was acquired by grant from the City of Des Moines, or by purchase or condemnation", and, it was added, "this resolution being offered for the purpose of carrying out the contract of date January second 1882" etc. One of the individual defendants, as secretary of the directors' meeting, recorded the adoption of the resolution. The Wabash Company was then the real party in interest. The conveyance executed by the officers so authorized, the individual defendant being one of them, was in form a warranty deed, but certainly the resolution of authority fixed the effect of the conveyance for the parties and those who afterwards dealt with knowledge of the facts. Mere executive officials of a railroad company cannot, upon their own initiative, convey away parts of its road and franchises. And, were it necessary to be determined here, it would be an interesting question how far its representatives in a terminal company organized and holding title like the one here, could do so by consenting to a vital change of its character, or even by a disposal of its stock, without express authority of their principal manifested in the usual corporate way. The thirty year contract of May 10, 1889, between the terminal company and the proprietary companies was authorized as supplemental to the contract of 1882, and in a preamble it was recited that in pursuance of its charter it acquired and owned a railway. The charter was that of 1884 into which the contract of 1882 was written. One other matter bearing on this phase of the case may be mentioned. The effort to purchase stock began in 1888. The property of the Wabash Company, including a half interest in the terminal stock not yet issued, was then in a transitional state in a foreclosure proceeding, being held by a purchasing committee. One of the defendants wrote Mr. Ashley, the president of the Wabash Company and also a member and the secretary of the purchasing committee, saying he had been asked whether half of that stock interest, one fourth of the whole, could be bought. Mr. Ashley replied favorably, adding:

"but I have always supposed that it would be necessary to confine the sale to such railway companies as would be interested in the station." Also: "Was there not an understanding or agreement as to the sale of the stock when the Terminal Company was formed and would it not be prejudicial to the interest of the whole to part with the stock to outsiders?" The defendant replied, agreeing with him and mentioning some railroads in whose interest inquiries had been made. The purchase was made in 1890. It was in 1892 that the other individual defendant made the sworn statement that the terminal company was "simply a representative company acting as an agency" for the railroad companies. About two months after the first sale the purchasing committee sold an additional eighth of the stock to the defendant. In a letter during the negotiations Mr. Ashley wrote him: "It must be understood of course, that a one eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company according to the understanding we had when you were here." The phrase "proprietorship in the company" is not commonly used to describe the stock of an ordinary corporation. Moreover the defendants being substantially interested in the proprietary companies, other than the Wabash, had been endeavoring to induce other railroads to come into the terminal company. They were, one or both, also officers of the terminal company. It would naturally be assumed that in dealing with them they were acting in the railroad and terminal interest as distinguished from that in which they now assert control. The record shows that it was common practice in correspondence to address them personally on subjects of corporate concern. In fact the three-eighths of the stock bought from the Wabash purchasing committee was transferred to and became the property of the Des Moines Northern & Western Railway Company into which the two other companies were merged. That was in 1892. The Des Moines Northern & Western then owned seven-eights of the terminal stock and the Wabash one-eighth. As has already been observed, the terminal company was declared in that year to have been simply a representative agency. Early in 1893 a similar declaration was made on behalf of that company. The Des Moines Northern & Western was financially dominated and officially controlled by the individual defendants. In the fall of 1893 their company pledged five eighths of the terminal stock to them as collateral to some indebtedness. In January, 1894, the pledged stock was by agreement applied as part payment to a small amount, and they have since held it. The next annual sworn statement on behalf of the terminal company to the Executive Council of the State of Iowa illustrates the transforming effect upon the character of the corporation which a mere transfer of its stock is supposed to have. In February, 1894, it was declared that the terminal company was the owner of the property; that it leased it to the railroad companies, performed services for them and collected a rental. My brothers adopting that theory say that the ultimate result was the entire emancipation of the terminal company from "outside government." According to the decision, the proprietary companies became outsiders without right, after the expi-

tion of the operating contract of 1889, to use the terminals, contrary to the will of the holders of five-eighths of the stock, except upon the order of some public administrative board in Iowa, if there be one with jurisdiction. I do not think the stock in the hands of the defendants should be destroyed or its true value in the scheme or plan of the terminal organization impaired, but that it should be actively operative and profitable only when transferred to and held by railroad companies which use the terminals and contribute in that way to the object of their creation. There are four or five other important railroad systems entering Des Moines besides those of the plaintiffs.

There is little conflict in the evidence. The difference between my brothers and myself is not so much about the facts as their significance. They put emphasis upon the corporate cover of the terminal company and perceive a drift to complete self-sufficiency and independency from the very moment of incorporation. But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all a mere legal fiction established for convenience and to serve the ends of justice. It does not go beyond that. In equity the shell artificially assumed is not impermeable. The court will look through it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization.

But however the above may be, it seems to me that the less measure of relief granted by the trial court cannot be denied the plaintiffs. It is that they were entitled to a continued use of the terminal properties and that the court would determine the terms and conditions if the parties were unable to agree. That is the matter of defendants' appeal. Whenever a definite right claimed by a railroad company to use specific property of another is of contractual origin, as where it is a condition of the franchise of the owner or is founded upon conventional agreement, the question of the existence, of the right and its extent and limitations is a justiciable one; and the claimant may invoke the aid of a court of equity for its establishment and enforcement. Similarly, when the right is upon reasonable terms and conditions the court may determine them if the parties do not agree. Both phases of this subject have been so decided in the cases, familiar in this circuit, of the Union Pacific Bridge at Omaha, and the Wabash right of way and tracks at St. Louis. If the right of use exists, reasonable terms and conditions are implied in the absence of recital or stipulation about them. In view of the admitted history of the terminal company the plaintiffs, merely as minority stockholders, have a right to the use of the terminals and upon reasonable terms. The right is not of that general nature which requires an appeal to some administrative board for the enforcement of the public policy of the State applicable to all railroad companies, but is essentially contractual. It could not reasonably be said that, had the contract of 1889 not been made, two of

the original companies holding a majority of the stock might have excluded the third from the use of the terminals and defeated its appeal to the courts. The individual defendants have no greater right or power.

Filed May 23, 1918.

(*Decree in Both Causes.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1918, Thursday, May 23, 1918.

No. 4885.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, THE WABASH RAILROAD COMPANY, and The Wabash Railway Company, Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL, and F. M. HUBBELL AND SON,

and

No. 4886.

DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL and F. M. HUBBELL AND SON, Appellants,

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, THE WABASH RAILROAD COMPANY, and WABASH RAILWAY COMPANY.

Appeals from the District Court of the United States for the Southern District of Iowa.

These causes came on to be heard on the transcripts of the record from the District Court of the United States for the Southern District of Iowa, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in these causes, be, and the same is hereby, modified, and the causes are hereby remanded to the said District Court with directions to modify its decree so as to state the complete title to the property in controversy in the terminal company, and that the only interest of the railways in the property or the management of the corporation is such as flows from stock ownership; that the surplus earnings belong to the railways, and to appoint a master under instructions to ascertain the part due each upon a wheelage basis.

It is further ordered that the costs in this Court be divided equally,

the Chicago, Milwaukee and St. Paul Railway Company et al., appellants in case No. 4885 and appellees in case No. 4886, to pay one-half thereof, and the Des Moines Union Railway Company et al., appellees in case No. 4885 and appellants in case No. 4886, to pay one-half thereof.

May 23, 1918.

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1918.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

No. 4886.

May Term, A. D. 1918.

DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Petition for Rehearing.

Come now the Wabash Railway Company, The Wabash Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company, and petition the Court for a rehearing in the above-entitled cause, in order that the main controversy therein, viz., whether
2137 the railway companies or the terminal company owns the terminal property in controversy, may be reconsidered; and as grounds therefor state as follows:

I.

The opinion of the majority of the judges, and the decision, is in conflict with the case of the Chicago, Milwaukee & St. Paul Railway Company, St. Paul, Minneapolis & Omaha Railway Company and Minneapolis Eastern Railway Company v. Minneapolis Civic and

Commerce Association (decided June 10, 1918), in the following particulars:

(*a*) In this case the Supreme Court held, on facts not substantially different from the facts in the case at bar, that the terminal tracks in controversy belonged to the using railway companies.

The only features which distinguish the two cases are, in the former the railway companies owned all the stock of the subsidiary company, whereas in the instant case some of the stock of the terminal company was owned by an outsider; but in the instant case the terminal tracks and facilities were constructed as a part of the railways of the using railway companies in obedience to their charter obligations to the state, whereas in the other case the company which constructed and owned the terminal tracks was organized by local citizens with charter obligations to build an independent railroad, and its stock was afterwards purchased by the using companies.

The circumstance that some of the stock of the terminal company in the case at bar is owned by an outsider ought not be influential, because it must be conceded the using railway companies
2138 owned all the stock and dominated the action of the terminal company when the tracks and terminal facilities were constructed as a part and in completion of their railways, and for a long time thereafter, and that under the rule announced in the above decision they at that time owned such rails and terminal facilities.

To hold that the using railway companies, by disposing of some of the shares of the terminal company, "chopped off" their railroads at the city limits of Des Moines, and thereby conveyed the terminal tracks and facilities to the terminal company, would be contrary to common sense.

Surely no court would hold that the ownership of an important part of a line of railway, placed for convenience in the name of a terminal company, at all times depends on whether the railway company owns all the stock of the terminal company, and that if at any time it sells one or more shares of such stock it thereby dismembers its railway, *i. e.*, today the railway owns all of the stock of the terminal company and, consequently, all the tracks in its name; tomorrow the railway sells or gives away some of the shares, and then it does not own the rails in the name of the terminal company; and the next day it acquires the shares so sold or given away, and again it owns the tracks of the terminal railway; and so on. Such flexibility pertains to legerdemain, and not to the title to property.

The circumstance that the terminals in controversy in the case at bar were constructed as a part and in completion of the railways, pursuant to the obligation of the railway companies to the state, renders the applicability of the principle applied in the above decision even more obvious than the facts in that case.

(*b*) The Supreme Court in the above decision held that in dealing with a corporation existing under circumstances not dissimilar in essential respects from those surrounding the terminal company in the case at bar the courts will desregard the corporate agency and

give effect to the substance of the transactions involved. The Court said:

"In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist, and as the justice of the case may require."

In the case at bar it is conceded the railway companies were under the necessity of using the terminals in controversy, and prompted by that necessity acquired the ground and entered into a contract for the purpose of securing, and, in fact, secured the needed terminals, but the majority of the judges hold that the railway companies unwittingly and unintentionally permitted the needed terminals to slip from them. The majority opinion says:

"Finally, it is urged that it can not be supposed that these railway companies would bring into being a creature, put into its hands such ownership and control over their property and endow it with such powers that it and not they could command the situation. Such a supposition is improbable and here unnecessary. There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances."

Thus it is held not only that the evidence did not indicate "that the railways intended any such result", but that such result was to them an "unexpected outcome". Again, the majority opinion says:

"Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded."

The majority opinion in effect holds that during the course of events the railway companies had no thought of parting with their terminals, but that the Hubbells designed to acquire an interest in them. To say the least, then, the minds of the parties did not meet and were not in accord with the forms which brought about the "unexpected outcome", and whereby the railway companies 'gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded."

The majority opinion on its face deals only with the forms of the transactions:

In addition, it is obvious, from the conclusion that the railway companies unwittingly and unintentionally dispossessed themselves of facilities they were bound to use, that the majority opinion rests on the forms and not on the real transactions—the intentions of the parties—in contravention of the above decision of the Supreme Court.

The dissenting opinion takes direct issue with the majority opinion on this point. In the dissenting opinion it is said:

"The difference between my brothers and myself is not so much about the facts as their significance. They put emphasis upon the corporate cover of the terminal company and perceive a drift to complete self-sufficiency and independency from the very moment of incorporation. But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all, a mere legal fiction established for convenience and to serve the ends of justice. It does not go beyond that. In equity the shell artificially assumed is not impermeable. The Court will look though it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization."

The Court properly assumed the conceded facts that the rights of innocent purchasers are not involved, and that the Hubbells initiated or co-operated in the performance of every act, on which the majority base the conclusion that the railway companies unintentionally permitted the terminal property to slip from them. As said in the minority opinion:

"It should always be in mind that in this case there are no innocent purchasers relying upon public records * * * Moreover, the defendants being substantially interested in the proprietary companies, other than the Wabash, had been endeavoring to induce other railroads to come into the terminal company. They were, one or both, also officers of the terminal company. It would naturally be assumed that in dealing with them they were acting in the railroad and terminal interest as distinguished from that in which they now assert control."

No reason, therefore, exists why the Court may not deal with the real transactions, and give effect to the intentions of the parties.

II.

The opinion of the majority and the decision are in conflict with the decision of the Supreme Court in the case of United States v. Terminal Railroad Association of St. Louis (224 U. S. 383).

In that case the terminal property was conveyed to the terminal company, which contemporaneously "granted" a joint easement to the railway companies, whereas in the case at bar the joint easement was "reserved" by the railway companies.

The two cases are not otherwise distinguishable. The Supreme Court in the last-mentioned case held the railway companies were entitled to the joint use of the terminal property and that the rails of the terminal company were the rails of the proprietary companies, whereas in the case at bar the majority opinion entirely overlooked the clause of the contract of 1882 by which the railway companies

created and reserved the joint easement. The majority opinion says of that contract:

"The contract is carefully drawn by skilled draftsmen who set off in brief, clean-cut, numbered paragraphs the different subjects of the contract." Is it not obvious that such draftsmen intended by that contract to create and reserve a joint easement in the railway companies on the terminal property when they wrote into that contract that the title to the terminal property should be held 'subject to the joint use and occupation of all said railway companies'?"

Is it possible skilled draftsmen wrote into the contract that the title to the terminal property should be held, "but subject to the joint use and occupation of all said railway companies" without intending to express any significance whatever?

Was not the only object and purpose of the contract to secure the joint use and occupation of terminals, and were not the quoted words appropriate to accomplish that object and purpose? The railway companies owned the land, which was already held in trust. Did they not agree that the land and terminals should be held "subject to the joint use and occupation of all said railway companies"?

Do not those words bear a definite meaning to the bench and bar? "Subject to" is an accustomed form of creating a reservation. Would a careful draftsman have intended nothing by the words "use and occupation of all said railway companies", which manifestly he borrowed from a decision of the Supreme Court of Iowa?

Without the quoted words is not the entire contract unintelligible and without meaning? Does not each and every one of "the clean-cut, numbered paragraphs" refer to and rest on the words "subject to the joint use and occupation of all said railway companies"?

May not the owners of land separate the use and occupation from the land itself—create an easement?

If two farmers are obliged to acquire a joint way, of necessity, and they enter into a contract covering the purchase of 40 acres of land, and agree by the contract that the 40 acres shall be held by a trustee, "but subject to a highway 40 feet wide on the south side thereof", would the quoted words have no significance? Would the trustee take the legal title to the roadway?

And in such case if the trustee afterward pays for the property held in trust would he not take the 40 acres burdened by the joint way of necessity? Would the fact that the trustee paid for what he held in trust indicate a change in the plan of the farmers, and denote an intent to part with the way of necessity—a way of necessity is, of course, what the words indicate, a way which the parties are obliged to use.

The majority opinion does not refer to, or discuss, the problems involved in these questions, or given any significance to the words in the contract, "but subject to the joint use and occupation of all said railway companies". It treats the contract of 1882 precisely as if those words have no meaning. The omission to give them the only significance they bear is the basic error on which that opinion rests.

The majority opinion is based on the reasoning that the terminal company paid for that which it took in trust, and therefore rests on

the erroneous assumption that the terminal company took as trustee the title to the joint easement reserved by the railway companies.

III.

The opinion of the majority and the decision are in conflict with the decision of the Supreme Court in the case of Joy et al. v. St. Louis (138 U. S. 1), wherein it was held that a covenant in a contract that all railway companies should have the right to use certain railway facilities and deeds and other instruments which were absolute on their face, and in form a contradiction of such covenant, should all be read together "as a single transaction relating to the same subject matter, and should be construed together in such a way as to carry into effect the intention of the parties in view of their situation at the time and of the subject matter of the instruments", and when so read involved a grant of an easement to all such companies.

The majority opinion fails to consider the covenant in the contract of 1882 which created and reserved the joint easement, and instead of treating that contract, the articles, the deeds and the contract of 1889 as successive steps in "a single transaction relating to the same subject matter", and instead of construing them "together in such a way as to carry into effect the intention of the parties", treated them as unrelated transactions, and so construed them as to produce an outcome "unexpected" and a result not intended by the interested parties.

Obviously the only purpose and object of the contract of 1882 was to secure to the railway companies the joint easement or joint terminals. This object and purpose must control in reading all subsequent documents relating to the same subject matter. It was essential that all subsequent steps should be clothed in forms and the forms apparently isolated the related transactions which according to the majority opinion unmistakably disclose the intention of the parties.

IV.

The opinion of the majority and the decision are in conflict with the following covenants of the articles of incorporation, which were entirely overlooked:

Article II provides, among other things, that the terminal company "shall not lease or otherwise dispose of the use of any part of its franchises to any other railway company * * * without the assent in writing" of the railway companies.

Article IV provides, among other things, "that no contract, lease or other agreement amounting to a permanent charge upon the property of the corporation shall be entered into by the board unless the same shall have been first approved by" the railway companies.

Manifestly these covenants were designed to prevent the terminal company from in any wise interfering with the full joint use and occupation of the terminal property by the railway companies.

The articles provide that no one shall be eligible to the office

of director except a nominee of the railway companies. The "board" was necessarily composed of representatives of the railway companies.

Why, then, were the above covenants made unless to limit the authority of the representatives of the railway companies who might represent them on the board of the terminal company?

The importance of those covenants is illustrated by the evidence, which shows that Mr. Hubbell sometimes dealt with the local representatives of the railway companies and sometimes with the New York officers. The local representatives did not know about his transactions with the New York officers, and the New York officers did not know about his transactions with the local representatives.

The "approval of the railway companies" and the "assent in writing of the railway companies" could lawfully proceed only from the board of directors of the railway companies as a result of formal corporate action.

It is said in the majority opinion:

"No reason appears why in this, as any kind of tri-party contract, two of the parties may not at will alter or annul any of such contract rights, if such action affects them alone. With such power to change their rights, the question becomes whether or not the terminal and railway companies have altered or annulled the rights arising from the contract contained in the articles of incorporation. They took no formal action accepting or ratifying these attempted changes in their contractual relations with the terminal company. But all of the individuals who acted at this purported meeting of stockholders of the terminal company were chosen by the three railway companies and certainly were merely their instruments."

It is undoubtedly true that parties to a contract may ordinarily annul the contract, but in the present instance the parties agreed specifically that the contract should not be annulled so as to dispose of "any part of the use of the terminals", or so as to make a "permanent charge upon them", except in a specified manner, viz., with the assent in writing or approval of the railway companies.

These provisions were entirely overlooked by the majority opinion, which finds in expressed terms that the railway companies "took no formal corporate action accepting or ratifying", etc., but holds that the terminal company deprived the railway companies of all without their written consent or approval, but by the acts of negligence of the local representatives of the railway companies, who were expressly denied any authority in the premises.

Covenants in contracts prescribing the manner of altering contracts and denying authority to the agents of the parties have uniformly been given effect.

In the case of Assurance Company v. Building Association (183 U. S. 308, l. c. 361) it was held

"that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent

of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered."

Mr. Hubbell understood these covenants and gave them a practical construction when he demanded and received from Mr. Ashley, at the time he purchased the stock an agreement "that said purchasing committee will consent to such change in said articles of incorporation as will permit one director of said company to be nominated by any person or corporation holding one-eighth of the stock of the said Union Railway Company" (1601, 1602).

This is the only consent or approval given by the railway companies.

From the instrument last mentioned it is obvious the majority of the Judges labored under a misapprehension when they said that "Hubbell was willing to purchase if the control of the railways as suggested and as given in the articles was removed. The articles were amended removing Hubbell's objection. The purchase was made."

The only evidence of a desire of Mr. Hubbell to amend the articles is the above contract consenting to an amendment so as to permit the holder of one-eighth of the stock to elect a director.

Mr. Hubbell testified:

"Q. Did Mr. Cummins explain to you that his purpose in amending the articles of incorporation of the Terminal Company was to straighten out the title to the terminal property?

A. I understand that his reason for claiming that an amendment of the articles was necessary, was that the Des Moines Union Railway Company was not carrying on business in accordance with the contract of January 2nd, 1882, and never had done so, and that it was necessary for the Des Moines Union to amend its articles so that they would conform to the methods and manner in which the Des Moines Union Company was operating and transacting the business" (175).

Mr. Cummins testified:

"These amendments were not suggested by Mr. Hubbell. They were entirely my own suggestions and came about in a way that I have already related. With regard to Mr. Hubbell's position, my recollection is that Mr. Hubbell—conservative then as now, never disposed to move very rapidly into the future—was opposed to my proposition, as I thought, without any good reason."

V.

The majority opinion and the decision are based on the erroneous assumption that "for seventeen years" after the adoption of the alleged amended articles "the railway companies acted in perfect harmony with the articles as amended. During all of that time there was no question of their validity, not until this suit was filed in 1907 was there any such attack. The doctrine of laches comprehends and controls the situation."

This ruling overlooks the conceded fact that during those seventeen years the rights of the party were defined by the contract of 1889 and actions of the parties governed accordingly.

It would be unsound to hold that the acts of parties in one relationship under one contract, covering a considerable period, constitute an acquiescence in another arrangement and relationship which in the nature of things could not have in a practical sense influenced their action during such period.

It is conceded that during the "seventeen years" the parties did not act under the amended articles but acted under the contract of 1889, and that as soon as Mr. Hubbell indicated that he claimed the terminal company owned the terminals the dispute arose and complainants filed this suit (328 and 329).

VI.

The ruling in the majority opinion that the railway companies are estopped from claiming the joint easement is without any support in the evidence. The majority opinion says:

"Neither as shareholders nor as parties contracting with the terminal company can the railway companies thus sleep upon their rights and then in a court of equity enforce such against those who have, to their knowledge, acted upon the belief that such rights did not exist and have acquired and hold property which has enormously increased in value in the interval."

Mr. Hubbell testified:

"I don't remember of the purchasing committee making any representations as to the title which the Des Moines Union Railway Company has to the Terminal property in the City of Des Moines. * * * I don't remember that the subject was discussed or talked about at all by any member of the purchasing committee. They simply sold the bonds and the stock by a written contract and I paid the price agreed upon."

Mr. Hubbell said in his letter to Mr. Ashley of June 18th, 1888:

"I agree with you that the sale of a quarter interest in the stock of the terminal company should be made only to a railway company, who will join with the Wabash in making a contract with the Des Moines Union, guaranteeing the interest upon the bonds and operat-

ing expenses. I think it would be prejudicial to sell any of this stock to outsiders."

And Mr. Ashley said in his letter of April 5th, 1890, to Mr. Hubbell, in connection with the sale of the stock:

"It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent proprietorship in the company, according to the understanding we had when you were here."

The understanding referred to by Mr. Ashley shows that Mr. Hubbell was aware of the claim of the railway companies to the joint easement. His statement that it would be prejudicial for the stock to be purchased by an outsider shows that he affirmatively represented to Mr. Ashley that he was not acquiring the stock for speculation nor to make money out of the terminal company.

We respectfully urge that not a scintilla of evidence can be found in the record tending to show that the railway companies had any knowledge or information that Mr. Hubbell understood or claimed that the terminal company owned absolutely all interest in the terminal property prior to the dispute which led to this suit, and we respectfully ask the Court to re-examine the evidence on that point.

VII.

The City of Des Moines has a population of more than 125,000 and is by far the most important commercial city and railroad center of Iowa. Under the majority opinion, the complainants are now practically excluded therefrom, the Wabash being held at the east city limits about two miles from the passenger and freight depot, and the St. Paul Company at the west part of the city, about one mile from the passenger and freight depot; and yet these three miles of railroad and these terminals were all constructed by their predecessors under franchises from the State of Iowa and as part and parcel of their roads. The majority opinion overrides the rule universally enforced by the United States Supreme Court, which forbids the alienating of this property or segregating it from the franchises under which it was constructed, or, as Judge Wade said, "chopping it off" from the lines of railway of which it was originally a part, on the ground that some public authority may compel the Des Moines Union Railway Company to permit complainants to use the property as a part of their respective lines of railway on equitable terms.

The following excerpt from the majority opinion shows that, in reaching this conclusion, which is clearly erroneous, the Des Moines Union Railway Company was treated as a terminal company, and therefore not subject to the general statutes, State and Federal, respecting railway companies:

"But it is said that if the railways did so convey all interest in these necessary parts of their roads, such action would be void. The rule invoked is that public carriers will not be permitted to contract away

their public usefulness by vitally maiming their lines. Rules of law extend no further than the basic reasons upon which they rest. The usefulness, if not the necessity, of terminal companies is established. That they must, as a general proposition, own their properties in order to raise funds to improve, maintain and operate them efficiently, is certain. The more efficiently and economically a railway can procure terminal facilities, the better and cheaper its services to the public should be. The conditions and compensation for use of such terminals by the railways is subject to public control, so that the railways can not be denied or unreasonably restricted in such usage. The public service is protected. It should be bettered by such a terminal arrangement. Therefore, the rule invoked by plaintiffs has no application to disposition of terminal portions of a railway to a terminal company." (Majority Opinion, foot page 26; top page 27.)

This is a serious and fundamental error. The Des Moines Union Railway Company is a railway company organized under the general railway statutes of Iowa, and is subject to and governed by the general railroad laws of that State, and the provisions of the Interstate Commerce Act. The statutes of Iowa nowhere provide for or recognize a terminal railway company; they do provide for the organization of union railway depots (Sections 2099-2102, Code of Iowa, 1897). The powers of such depot companies are limited to acquiring, establishing, constructing and maintaining union station houses or depots with railroad tracks and other appurtenances. Such companies have no power to operate engines or cars, or to engage in the business of transportation. The Supreme Court of Iowa, in Morgan v. Des Moines Union Railway Company, 113 Iowa 561, 85 Northwestern Reporter 903, decided that this defendant corporation was not organized as a union railway depot, but was organized under and governed by the general laws of the State appertaining to the organization and operation of railroads. It was expressly held in this case that the statutes applying to union railway depots were not applicable to the Des Moines Union Railway Company. Section 2116 of the Code of Iowa, which requires railway companies upon reasonable notice to furnish suitable cars, and to provide suitable facilities for receiving and handling freight at any depot, and to receive and transport the empty or loaded cars furnished by any connecting road, to be delivered at any station, and to return them to such connecting road, does not meet the situation outlined in the majority opinion that:

"The conditions and compensation for use of such terminals by the railways is subject to public control, so that the railways cannot be denied or unreasonably restricted in such usage. The public service is protected. It should be bettered by such a terminal arrangement. Therefore, the rule invoked by plaintiffs has no application to disposition of terminal portions of a railway to a terminal company." (Majority opinion, 26, 27.)

It is apparent that section 2116 does not require one railway to haul the passenger trains or coaches of another railway company to its depots, and to furnish station facilities; nor does it require one company to break and reform the trains of another company; nor does it compel one company to give the use of its team tracks or freight houses, or furnish terminal facilities to another—the very things complainants must have, and which they cannot legally demand, if the decree herein ordered is permitted to stand.

The federal statutes—section 3 of the Interstate Commerce Act—in terms provide that any carrier subject to that act shall not be required to give the use of its tracks or terminal facilities to another carrier. The Des Moines Company is engaged in interstate commerce and is subject to that act.

That there is no federal law or rule which would compel one railway company, or even a terminal company, to thus accommodate another company, is made clear by the decision of the United States Supreme Court in the St. Louis Terminal case. Had there been such a rule the Court would have said in that case that under this rule the St. Louis Terminal Company could be forced to admit a new or outside railway company to cross either of its bridges and to use its terminals, but because of the absence of such a rule the Court entered the decree which it did, virtually dissolving the consolidated corporations.

We believe that we are so familiar with the decisions, state and federal, as to warrant us in saying that no decision can be found that would afford any relief to complainants, if this majority opinion is to stand.

Two points in the opinion stand out clear, and, in themselves, demonstrate that the final result is wrong:

First: The admission that the record shows that the railway corporations did not intend to cut themselves off from the use of the terminal property, or to change the defendant company from a mere holding company or agency to an independent owner;

Second: That under the arrangement between all parties, as shown by the contract of May 10th, 1889, the Des Moines Union was to maintain the property and do all the work of the railway companies at cost and without any profit or income to the Des Moines Union or its stockholders.

Courts of equity do not deprive parties of their property rights when they have done nothing that shows an intention to do so. It is obvious that a corporation which by its own charter undertakes to "acquire, operate and maintain certain property in such manner as to best serve the interests of" another party, and assumes to and does hold and maintain the property, and devotes it to the use and benefit of such other party, without profit to itself, is a mere holding corporation—a mere agency for such other party.

This view is strengthened by the fact that the Des Moines Union Railway Company was created by the railway companies under the apparent necessity of consolidating titles to the right-of-way held

in the names of different parties, and giving the property singleness of management to the end that it would best serve the interests of the public and the railway companies, parties to the contract of January 2, 1882.

The fact that subsequent experience proved that it was impracticable for each railway company to do its own switching was a good reason for creating an agency which would do this for them, but was no reason for selling the property to such agency and surrendering all right to have beneficial use of the same, and depriving themselves of the facilities that were absolutely essential to an entrance into this large city.

VIII.

The opinion (page 17) holds that the words in the articles of association, "all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract," amounts to a mere limitation upon the powers of the corporation.

This is another serious and fundamental error.

When the state clothed Hubbell and his associates with corporate existence, accompanied with a railroad franchise to be exercised for the public good, they and their successors, by accepting the charter, assumed the duty to exercise all the powers conferred upon the corporation; and this provision in the charter was a part of the law of its existence. Instead of being a mere limitation upon its powers, it declared the purpose of the state in creating and endorsing the corporation, and fixed the object which the corporation was to have in view, and prescribed what it must do affirmatively. In this clause of the charter the state did not say what the corporation should not do; nor did it even say what the Des Moines Union as a creature of the state might do; but the state said plainly what the corporation should do—viz: that "all its powers shall be exercised according to the terms and spirit of that contract which the state had placed in its charter to emphasize its command. We repeat, the charter did not say, "You shall not do so and so"—but said: "You shall exercise all your powers to carry out the contract of 1882 according to its letter and spirit." The Des Moines Union did exercise its corporate powers in the way of acquiring and taking over this property, and therefore, whether we regard this provision in its articles as a command from the state, or as a mere limitation upon its powers the controlling effect is the same.

The provision in the contract that the Depot Company might issue mortgage bonds was carried out. The provision implied that the title to the property would be placed in the Depot Company. Obviously the purpose was to enhance the security, and not to defeat the declared purposes of the contract; for how could the Depot Company execute mortgage bonds that would be of value to the parties who were to receive them, unless it held the legal title? It is plain that these two provisions must be construed together and that organizing a corporation to act both as trustee and as a Depot Company were not at all out of harmony with the 1882 contract. Moreover, even if we concede that the contract contemplated a trustee

separate from a Depot Company, still, if the parties afterwards concluded to combine them in one entity, this could not be regarded as an abandonment of the declared purpose of the contract.

But it seems a work of supererogation to argue this; for if they intended to abandon the 1882 contract, then why was it ever referred to in the articles of association; and why was it set out in extenso in the articles; and why was it explicit-y stated that the purpose of organizing the corporation was to carry out that contract; and why declare that the powers of the corporation should be exercised not only in harmony with its terms, but with its spirit?

So far we have reviewed the opinion merely on the facts which it recites; but when we go to facts which the opinion does not recite or even refer to, the error is still more apparent.

Defendants in their answer say that the 1882 contract "was tentative only", and that " it was not the purpose or the effect of said contract to evidence any such definite or completed plan" and the majority seem to have adopted this view to the extent of holding that in organizing the Des Moines Union Railway Company, and in turning the property over to its management, the three railway companies abandoned the contract of 1882, and that each abandoned or lost its rights acquired or held under the contract.

Neither of the respondents were parties to this contract, and their understanding of it and its effect, as well as their intent, can not be inquired into; and as to each of the three railway companies, the facts are that from the day of its execution, all three acted under it, and the property was maintained and used by them in full and strict accord with its terms for seven years and four months, and up to the making of the contract of May 10, 1889, which latter contract merely supplemented that of 1882, and was for a definite period only. Moreover, this supplemental contract as construed by the parties and by this Court, is in full harmony with the general plan and purpose of that of 1882.

As the 1882 contract provided for placing the title in a trustee for perpetual holding, and Howe and Dodge agreed to convey to such trustee all parcels of real estate to which they held title on reimbursement of their outlay upon the property, and as the trustee who was to hold the title was to be thereafter named, might not the railway companies create a corporation and have the property conveyed to it to hold as trustee? A corporation would live forever, but a natural person would die; and as the title was to be held in perpetuity, a corporation was necessary. A corporation could be controlled through its stock; but a natural person would be governed by law, and might become troublesome. The railway companies therefore had the strongest reason for creating a corporation and using it as trustee, without thereby abandoning the original contract.

The contract also provided that the railway companies might create a depot company to take permanent charge of the property "upon the terms herein set forth"; and such corporation might issue its mortgage bonds to reimburse the parties to the contract in the amount of their respective portions of the cost of the said purchase and improvements.

How could this "depot company" issue its mortgage bonds with-

at being invested with the apparent title to the property which it ca to mortgage? Here, then, was the strongest reason for the railway companies, agreeing on the depot company as the trustee. Surely this was not an abandonment of the 1882 contract, for that contract explicitly provided for a future agreement in respect of a election of a trustee. And well they might agree to make the "depot company" such trustee. But aside from all this, surely it s not meant to hold that when A and B make a written contract, a ubsequent agreement modifying it abrogates the original contract, specially when the parties refer to it in the next contract or arrangement without showing a plain intent to rescind the former contract.

Moreover, the 1882 contract as to who should be trustee to hold the title, and as to a depot company, was general, and contemplated that details should and would be settled and arranged by the parties thereafter. The creating of the Des Moines Union Railway Company and conveying the titles to it and putting it in charge of the property were all in line with the general purpose and terms of the 1882 contract.

IX.

There is another serious and fundamental error in the majority opinion, in holding that the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, or their successors in title and interest, parted with, or conveyed to, the Des Moines Union Railway Company the rights acquired and held by them under the contract of January 2, 1882.

While the St. Paul Company and the Wabash Company were properly joined in the suit because seeking the same equitable relief, yet, as to the first or main branch of the case they do not derive title, or acquire their rights, from the same source, nor through the same channel. The St. Paul Company is the successor in title and interest of the Des Moines Northwestern Company and the St. Louis, Des Moines & Northern Company; and the St. Paul Company can not be affected or prejudiced in its rights by anything done by the Des Moines & St. Louis Company subsequent to the January 2, 1882, contract. By that contract, any and all rights or interest of either of the three railway companies were merged in one common interest, and the three companies became tenants in common of the property, subject only to the following conditions: (*a*) The parties who had advanced money were to be reimbursed, and such reimbursement might be made in bonds secured by mortgage on the property; (*b*) the title was to go to and be held by a trustee, who was to be agreed upon by all three; (*c*) each corporation was to contribute to the future cost of maintenance, taxes, and betterments in proportion to wheelage use by each. Subject to these conditions definitely fixed and determined, the Des Moines Northwestern Railway Company by that contract became a full and equal co-tenant of the property and any additions, and could not be affected or prejudiced by any act of either or both of its co-tenants thereafter. By that contract, each corporation granted to each of the other two a full use in common

with itself of all that it owned or had a right to. It is a universal rule of law that a grant of the fullest use that property is capable of, is the equal of a grant of the property itself; and the grant to the Des Moines Northwestern Railway Company of the full right in perpetuity to use in common with the other two, was in fact a grant of a one-third interest in the property. Being thus invested with a one-third interest, what did the Des Moines Northwestern Railway Company subsequently do to divest itself of that interest, and transfer it to the Des Moines Union Railway Company? The opinion fails to point to any act or any combination of acts showing such transfer, or a grant to the defendant company. This is because no such act or acts can be found in the evidence, or anywhere in the entire record. All of its acts and those of its successors in title, on this point, are the following:

The Des Moines Northwestern Railway Company went into possession and, together with the St. Louis, Des Moines & Northern Railway Company from the execution of the contract, used the road from Fourth street west, and as soon as the road was also completed to Fourth street from the east in the fall of 1882 it used the entire property to the east city limits and performed its part of the contract. After using it thus for three years, its directors adopted a resolution which recited the making of the 1882 contract and declared a desire to have a corporation organized "for the purpose of taking and holding the property," and appointed defendant Hubbell and another to act for it in organizing "such corporation * * * so to be organized for the purpose of carrying out the objects of said contract of January 2, 1882" (see plaintiff's evidence, original paging 187). Was there in this anything indicating an intent to abandon the contract, or to part with its rights thereunder? On the contrary, it was to carry out that contract.

The articles of association were filed for record December 10, 1884; and on January 1, 1885, the Des Moines Northwestern Railway Company stockholders, at their regular annual meeting, on motion of F. M. Hubbell, adopted a resolution which recited the contract of 1882, and that

"on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated and provided for in the aforesaid contract * * * and to carry out the purposes of said contract of January 2nd, 1882 * * * Now, therefore, Resolved, that this company accepts and ratifies so far as its interests are affected thereby the articles of incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of said contract of January 2, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company."

By way of resume, we insist in behalf of the Chicago, Milwaukee & St. Paul Railway Company that in so far as the rights originally held by the Des Moines Northwestern Railway Company are now

involved, this complainant can not be prejudiced by any conveyance made by any of the other railway companies to the Des Moines Union Company further than were authorized by the contract of 1882.

Looking into the record for the acts of the other remote grantor of the St. Paul Company, we find that it built and was the owner of the road from Fourth street westward; but a portion of the right-of-way had been acquired in the name of G. M. Dodge, who financed the corporation in the building of its entire railway in and outside of Des Moines; and the remainder of the right-of-way from Fourth street westward to Farnham street stood in the name of the corporation. A compliance with the 1882 contract therefore required a conveyance to the trustee of the parcels so held east of Farnham street. By the 1882 contract the St. Louis, Des Moines & Northern Railway Company agreed that this right of way should be conveyed to the trustee, and by its subsequent acts it agreed that the Des Moines Union Railway Company was to be such trustee, for in a resolution of its board of directors it requested Howe and Dodge to transfer to the Des Moines Union Railway Company the property which stood in their names. Now, it must be noted that nothing stood in the name of Howe or Dodge but certain lots of land used for right-of-way. Neither Dodge nor Howe had little to or ownership in the railroad, or in the franchises; so that Howe and Dodge could not transfer or convey any part of or interest in these. True it is, the St. Louis, Des Moines & Northern Railway Company made a quitclaim deed to certain lots; but this did not serve to convey the railroad, nor any franchise; nor did it convey the right to use the railroad under the contract of January 2, 1882. A conveyance of ground used for railroad right-of-way does not carry the railroad nor the right to operate and use the road (see printed argument of J. C. Cook for the C., M. & St. P. Ry. Co., beginning at foot of page 44).

Here was an explicit declaration of its understanding that the Des Moines Union was to act in accordance with the terms of, and was to carry out, that contract; and it is also a declaration of the understanding that was to accompany its future acts or dealings with this new corporation.

But this is not all; for, by a resolution of the Des Moines Union board of directors, that corporation declared its readiness and purpose to act under and according to the terms of the 1882 contract. Moreover, by this resolution, knowledge and notice of this corporate action of the Des Moines & Northwestern was acknowledged by the Des Moines Union Railway Company, and its aforesaid resolution was a reply to it, and this constituted an agreement in writing to act under and according to the 1882 contract.

The records of the Des Moines Northwestern Railway Company and those of its successors in interest show no further corporate action. Neither it nor any of its successors in title or in interest ever made any conveyance of anything real or personal; nor did it or any of them ever relinquish or convey to the Des Moines Union the rights acquired by it, or held under the 1882 contract. This remarkable

and controlling fact is entirely overlooked by this Court, although distinctly urged in brief and printed argument of Mr. Cook. (See argument of J. C. Cook for Chicago, Milwaukee & St. Paul Railway Company, beginning at foot of page 44), and was also urged by Mr. Hanson in his oral argument.

Although all conveyances by others to the Des Moines Union were made before May 1, 1888, yet the Des Moines Northwestern Railway Company continued to use the property according to the terms of the 1882 contract, and precisely as it had done before, until the operating contract of May 10, 1889. There was no change except that under that contract the Des Moines Union did the work for all the roads at cost, and acted for the Des Moines & St. Louis Company in maintaining the property at cost, the Des Moines & Northwestern or its successors contributing to such operating and maintenance just as was required by the 1882 contract. It is a travesty upon law and justice to say that the Des Moines Northwestern and its successors in title and interest in some manner and at some time lost all rights under the 1882 contract, except as for a time they were modified by the contract of May 10, 1889; and this Court unanimously and, we think, correctly holds that during that time the Des Moines Union merely acted as an agency for the three railway companies to serve their interests at cost and without profit to itself.

By the 1882 contract the Des Moines Northwestern Railway Company acquired a substantial right and interest in perpetuity, and surely it required affirmative corporate action by it or a successor to divest itself of that right and interest, and a Court should not declare such a divestment unless it can point to the very act which shows an intent to alienate.

It must be remembered always that we have here no intervening rights; no innocent third party misled by ignorance of the true facts. Mr. Hubbell testified that he had not changed his position or been induced to purchase stock by anything that occurred after May, 1888, and it goes without saying that as he was an active participator in every act of each of the corporations, he had full knowledge of the true facts

X.

In conclusion we desire to again bring to the attention of this Court the important circumstance that this terminal property was created for the the express purpose of securing to the three companies and their successors the right to use the same in perpetuity without cost to them other than interest upon the actual cost thereof plus the cost of maintenance and operation. The mortgage bonds issued for the acquisition of this property still remain unpaid, and so far these three companies and their successors have had the use of this terminal property without profit to the terminal company. If, now, there is to be a revaluation of this entire property, and the complainants, by grace of the Hubbells, who own five-eighths of its capital stock, are permitted to use it on such terms as they may exact, it is quite apparent that one of their exactions will be the payment of a full rate

of interest on such revaluation. This will not only operate injuriously to complainants, but will impose a substantial additional charge upon the public and result in an immense annual income to the Hubbells on a comparatively small investment. In fact, the record warrants the inference that the stock which they now hold was acquired by the manipulation of records and accounts of the Des Moines Northern & Western Railway Company and without the expenditure of a single dollar, and with the admission by Hubbell that "It would be prejudicial to sell any of this stock to outsiders," which was an assurance that he did not purchase the stock as an investment or speculation. The situation which will be brought about if this opinion is to stand will be exceptional in respect of the relation which will exist between this terminal property and complainants' railway systems, for it is a matter of common knowledge that practically all terminals are owned by and operated in the interest of the railway companies using them and that no additional charge is made to the public on account of the use of terminal facilities.

We submit that in view of the public interests involved in this case, the large and cumbersome record, and the many points relied upon and involved in the dispute, and the division of opinion among the Judges, for the reasons heretofore indicated, a reargument and a reconsideration of the main point of the case would be in the interest of justice.

Respectfully submitted,

J. C. COOK,
BURTON HANSON,
JAMES L. MINNIS,
Solicitors for Appellants.

We, the undersigned, counsel for petitioners, hereby certify that we have read the foregoing petition for rehearing, that the same is not made for the purpose of vexation or delay and in our opinion is well founded in law.

J. C. COOK,
BURTON HANSON,
JAMES L. MINNIS,
Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul- 22, 1918.

(*Order Denying Petition of Chicago, Milwaukee & St. Paul Railway Co. et al. for a Rehearing.*)

September Term, 1918, Monday, October 28, 1918.

These causes came on this day to be heard upon the petition for a rehearing, filed by Counsel for the Chicago, Milwaukee and St. Paul Railway Company, et als., appellants in No. 4885 and appellees in No. 4886.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of these causes, be, and the same is hereby, denied.

October 28, 1918.

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1918.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

May Term, A. D. 1918.

No. 4886.

DES MOINES UNION RAILWAY COMPANY et al., Appellees,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Petition for Rehearing by Appellees in No. 4885 and Appellants in No. 4886.

Come now the Des Moines Union Railway Company, F. M. Hubbell and Son, F. M. Hubbell and F. C. Hubbell and petition the Court for a rehearing of this cause so far as relates to the "surplus earnings" in controversy between the parties hereto and in support of such petition submit:

I.

The Court erred in holding that the Des Moines Union Railway Company was not entitled to the "surplus earnings" in controversy between the parties, when the contract in relation thereto was clear and unambiguous as to such "surplus earnings" and the contract therefore was not subject to variation from its terms by any conduct of the parties thereunder.

II.

The Court erred in holding that although the "surplus earnings" were not credit items in favor of the Railroad Companies within "a strict construction of the exact wording of the contract" of May 10th, 1889, that none the less they should be allowed as such in view of the history of the transaction and upon the meaning to be given to the contract in its entirety.

The construction given to the contract by the parties from January 1892 until just before this suit was brought was in entire accord with the exact wording of the contract and the paragraph of the contract relative to the credit items to be allowed the railroad companies was not qualified in any way by any other provision of the contract.

III.

The Court erred in holding that the "subsequent contract of July 31st, 1897, does not affect this controversy."

When the contract of July 31st, 1897, was entered into by the parties, they had, pursuant to the express terms of the contract of May 10th, 1889, for more than five years continuously and consecutively withheld such "surplus earnings" from the credits to which the railroad companies were entitled in determining the payments to be made by them for the services rendered to them by the Des Moines Union Railway Company and the contract of July 31st, 1897, was designed to and did affirm the express terms of the contract of May 10th, 1889, as stating the true intent and meaning of the parties thereto.

IV.

The statement in the annual reports of the Des Moines Union Railway Company from 1888 to 1894, that it was simply a representative company acting as an agency for the railway companies, performing all necessary work for them, and charging each at actual cost its due proportion thereof incurred, is not repugnant to the said contract of May 10th, 1889, nor to the construction of the same by the conduct of the parties under it subsequent to January 1892.

V.

The contract of May 10th, 1889, was not and could not be changed by anything contained in said annual statements.

VI.

It was competent for the parties to the contract of May 10th, 1889, to determine how the costs and expenses of the services rendered by the Des Moines Union Railway Company to the railroad companies

should be ascertained and what credit items should be allowed therein, and this was done in express terms by paragraphs one to five, both inclusive of section three of said contract and paragraph four of section three provided as to credit items to be deducted from the ascertained costs and expenses of rendering the services only that "there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part (the railroad companies) on a wheelage basis, and from January 1892 until a short time before this suit was brought settlements between the parties were made monthly on this basis. And on this basis settlements had been made for more than five years when the contract of July 31st, 1897, was made by which the contract of May 10th, 1889, was affirmed in its very terms, a copy being attached for complete identification.

VII.

The Court erred in finding that the contract of May 10, 1889 was not affected by the contract of July 31st, 1897, with respect to the disposition of said surplus earnings, for the reason that the issue with respect to the disposition of said surplus earnings was, as shown by the evidence, a subject of negotiation between the parties to said contract and as a result of said negotiations the contract of July 31st, 1897, was executed, and by its terms the parties agreed that the subject matter of said surplus earnings should be disposed of as provided by the terms of the written contract of May 10th, 1889.

Respectfully Submitted,

J. L. PARRISH,
F. W. LEHMANN,
For the Petitioners.

The undersigned of counsel for the above named petitioners do hereby certify that the foregoing petition for rehearing is filed in good faith and not for any purpose of delay and is believed by them to be well grounded in law.

St. Louis, Missouri, July 22nd, 1918.

J. L. PARRISH,
F. W. LEHMANN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 22, 1918.

(Order Denying Petition of Des Moines Union Railway Company et al. for a Rehearing.)

September Term, 1918, Monday, October 28, 1918.

These causes came on this day to be heard upon the petition for a rehearing, filed by counsel for the Des Moines Union Railway Company, et al., appellees in No. 4885 and appellants in No. 4886.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of these causes, be, and the same is hereby, denied.

October 28, 1918.

United States Circuit Court of Appeals, Eighth Circuit,
May Term, A. D. 1918.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al.,
Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

May Term, A. D. 1918.

No. 4886.

DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al.,
Appellees.

Appeal from the District Court of the United States for the Southern District of Iowa.

Motion by Appellees in No. 4885 and Appellants in 4886 to Modify Decree.

Come now the Des Moines Union Railway Company, F. M. Hubbell and Son, F. M. Hubbell and F. C. Hubbell and subject to their petition for rehearing herein, move the Court to modify the decree entered herein so as to provide that an accounting be had as to the amount of the surplus earnings which complainants shall be entitled to receive and in support thereof show the Court:

That the opinion and the decree herein provide that this case shall be remanded with directions, among other things, to appoint a master to ascertain the part of the surplus earnings due each of the complainants upon a wheelage basis.

That the contract of May 10, 1889, in Section 3 thereof (Vol 2, p. 481) provides the basis for ascertaining the amounts which shall be paid by complainants for terminal facilities and services rendered by the Des Moines Union Railway Company. By Section 4 of said

contract (p. 481) it is provided that the earnings of the Des Moines Union Railway Company to which the complainants shall be entitled to credit shall be deducted from the indebtedness due from the complainants ascertained as provided for in Section three. The bill in this case, after making appropriate allegations with respect to said surplus: (Vol. 1, p. 33)

"First: That said defendant, the Des Moines Union Railway Company be required to render to your orators a full and true account of all moneys earned and received by it for switching services, real estate rentals, and from other sources hereinabove mentioned, giving the dates, sources from which derived, amounts, portions of said receipts expended, the purposes and dates of such expenditures, and the balance now on hand, together with a full and true statement and description of all properties acquired, and improvements made and paid for from such earnings.

Second: That all the said earnings or receipts in the hands of said defendant be paid over to your orators on the basis of their respective wheelage, or credited on said basis upon the monthly bills of said defendant against your orators, for the maintenance, repair and operation and other charges pertaining to the maintenance and operation of said properties."

The petitioner further shows the Court that in the trial of this case in the Court below, no accounting was had and no testimony was introduced upon the issue as to the amount or extent of said surplus earnings or as to whether or not there was indebtedness due from the complainants accruing under Section 3 of the contract of May 10th, 1889, upon which said surplus earnings or a portion thereof, should be credited.

That to carry out and comply with the decree of this Court and to comply with the contract of May 10, 1889, as construed by this Court, it is necessary to include in the accounting, the issue as to the extent and amount of said surplus earnings as to whether or not there is indebtedness due your Petitioner under Section 3 of the contract, upon which said surplus earnings should be credited.

Your petitioner further shows the Court that at the time of the trial of this case in the Court below, it was impossible to have a full and complete accounting either as to the amount of said surplus earnings or as to any indebtedness due Petitioner under Section 3 of said contract upon which said surplus earnings should be credited for the reason that the said contract then had several years to run; said contract expiring by limitation upon the first day of May, 1918.

That in fact the claims of Petitioner against complainants for terminal facilities and services rendered to them under the terms of said contract, and for which it is entitled to compensation ascertained in the manner provided for in Section 3 thereof, amounts to many thousands of dollars; some of which claims are disputed by complainants.

It seems to us unnecessary to say much in the way of arguing the

merits of this motion. Clearly the contract of May 10th, 1889, does not primarily require the terminal company to pay to complainants these surplus earnings. The theory of the contract is that the complainants shall pay to the terminal company an amount to be ascertained as provided in Section 3. Under the provisions of Section 4 as construed by the Court, the surplus earnings are to be credited upon the amounts ascertained to be due the terminal company under Section 3, so that complainants are not entitled to these surplus earnings so long as there is anything due under the terms of Section 3. In other words, the primary obligation contained in Section 4 is to credit and not to pay.

In construing Section 3 it is conceivable that a controversy might arise between the parties and indeed such a controversy has arisen. It necessarily follows that preliminary to a determination as to how the surplus earnings shall be divided between complainants and the formulation of a decree requiring said distribution, the amount of these surplus earnings must be ascertained and this involves the question of what is due the terminal company under the provisions of Section 3.

Of course, it may be that our rights with respect to this controversy are preserved by the decree in its present form, because it may be said that the earnings in question cannot be properly described as surplus earnings except to the extent to which they exceed the amounts which should be credited upon the indebtedness due the terminal company, ascertained in the manner provided for in Section 3, although the term "surplus earnings" has so far been used in this litigation to mean earnings of the terminal company other than those "which other railroad companies may be under obligation to pay by virtue of contracts for the use of said property."

However this may be, it seems to us for the purpose of avoiding any controversy over this subject in the future process of this litigation, the decree ought to be amended so as to make it clear that the terminal company should not be required to pay complainants any sums which may properly be used in satisfaction of any claims arising under Section 3 of the contract.

Respectfully Submitted by

J. L. PARRISH AND
F. W. LEHMANN, FOR
Des Moines Union Railway Company, F. M. Hubbell and Son, F. M. Hubbell and F. C. Hubbell.

The undersigned counsel for the above named moving parties certify that the foregoing motion is made in good faith and not for delay and is believed by them to be well grounded in law.

J. L. PARRISH AND
F. W. LEHMANN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 22, 1918.

(Order Denying Motion of Des Moines Union Railway Company et al. to Modify Decree.)

September Term, 1918, Monday, October 28, 1918.

These causes came on this day to be heard upon the motion to modify the decree, filed by counsel for the Des Moines Union Railway Company, et al., appellees in No. 4885 and appellants in No. 4886.

On consideration whereof, it is now here ordered by this Court, that said motion to modify the decree in these causes, be, and the same is hereby, denied.

October 28, 1918.

(Motion for Stay of Mandate in Cause No. 4885.)

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Appellees.

Come now the appellants in the above entitled cause, and show unto the Court as follows: That on October 28th, 1918, an order of this Court was entered in this cause denying appellants' petition for a rehearing.

That it is the purpose of appellants to make timely petition to the Supreme Court of the United States for a writ of certiorari to be directed to this Court to the end that the decision and decree of this Court in this cause may be reviewed by the Supreme Court of the United States.

Wherefore, appellants move the Court to enter an order herein directing the clerk to withhold the mandate of this Court in this cause for a period of three months from October 28th, 1918; and if within said three months these appellants shall have filed in the Supreme Court of the United States their petition for a writ of certiorari directed to this Court in this cause, and the same be not acted upon before the expiration of said three months' period, then that said mandate be further withheld until the said Supreme Court of the United States shall have passed upon the said petition of these appellants.

J. C. COOK,
BURTON HANSON,
N. S. BROWN, AND
JAMES L. MINNIS,
Solicitors for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 31, 1918.

(Motion for Stay of Mandate in Cause No. 4886.)

No. 4886.

DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellees.

Come now the appellants in the above entitled cause, and show unto the Court as follows: That on October 28th, 1918, an order of this Court was entered in this cause denying appellants' petition for a rehearing.

That it is the purpose of appellants to make timely petition to the Supreme Court of the United States for a writ of certiorari to be directed to this Court to the end that the decision and decree of this Court in this cause may be reviewed by the Supreme Court of the United States.

Wherefore, appellants move the Court to enter an order herein directing the clerk to withhold the mandate of this Court in this cause for a period of three months from October 28th, 1918; and if within said three months these appellants shall have filed in the Supreme Court of the United States their petition for a writ of certiorari directed to this court in this cause, and the same be not acted upon before the expiration of said three months' period, then that said mandate be further withheld until the said Supreme Court of the United States shall have passed upon the said petition of these appellants.

J. L. PARRISH,
F. W. LEHMANN,
Solicitors for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 4, 1918.

(Order Staying Mandate in Both Causes.)

September Term, 1918, Monday, November 18, 1918.

No. 4885.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Appellants,

vs.

DES MOINES UNION RAILWAY COMPANY et al.

and

No. 4886.

DES MOINES UNION RAILWAY COMPANY et al., Appellants,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al.

Appeals from the District Court of the United States for the Southern District of Iowa.

Upon consideration of the motions filed by counsel for appellants in each of these causes, for a stay of the mandate of this Court for a period of three months from October 28, 1918, pending the petitions of said appellants to the Supreme Court of the United States for a writ of certiorari and for such further time until said petitions shall have been passed on, if not passed on before the expiration of said three months' period.

It is now here ordered that the mandate of this Court in these causes, be, and the same is hereby, stayed for a period of three months from and after October 28, 1918, pending the petitions of appellants to the Supreme Court of the United States for a writ of certiorari and until such petitions for writ of certiorari shall have been passed on by said Supreme Court.

November 18, 1918.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of five volumes, Volume I consisting of pages 1 to 216, inclusive; Volume II consisting of pages 217 to 895, inclusive; Volume III consisting of pages 897 to 1266, inclusive; Volume IV consisting of pages 1267 to 2033, inclusive, and Volume V consisting of pages 2035 to 2185, inclusive, contains the transcript of

the record from the District Court of the United States for the Southern District of Iowa, as prepared and printed, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein the Chicago, Milwaukee & St. Paul Railway Company, et al., were Appellants, and the Des Moines Union Railway Company, et al., were Appellees, No. 4885, and wherein the Des Moines Union Railway Company, et al., were Appellants, and the Chicago, Milwaukee & St. Paul Railway Company, et al., were Appellees, No. 4886, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-eighth day of December, A. D. 1918.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

File No. 26,905.

Supreme Court of the United States, October Term, 1918.

No. 819.

(No. 4885 in the United States Circuit Court of Appeals.)

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY et al., Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the transcript of record herein, now on file in the office of the Clerk of the Supreme Court of the United

States be taken as the return to the writ of certiorari issued in this cause under date of March 22nd, 1919.

JOHN C. COOK,
BURTON HANSON AND
JAMES L. MINNIS,
Attorneys for Petitioner.
J. L. PARRISH &
F. W. LEHMANN,
Attorneys for Respondents.

(Endorsed:) No. 4885. File No. 26,905 Supreme Court of the United States, No. 819, October Term, 1918. Chicago, Milwaukee & St. Paul Railway Company et al., Petitioners, vs. Des Moines Union Railway Company et al., Respondents. Stipulation as to return to writ of certiorari. Filed Apr. 1, 1919, E. E. Koch, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Chicago, Milwaukee & St. Paul Railway Company et al. are appellants, and Des Moines Union Railway Company et al. are appellees, No. 4885, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Endorsed:) File No. 26,905. Supreme Court of the United States, No. 819, October Term, 1918. Chicago, Milwaukee & St. Paul Railway Company et al. vs. Des Moines Union Railway Company et al. Writ of certiorari. Filed Apr. 1, 1919, E. E. Koch, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of the Chicago, Milwaukee and St. Paul Railway Company et al., Appellants, vs. Des Moines Union Railway Company, et al., No. 4885, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this second day of April, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 26,905. Supreme Court U. S. October Term, 1918. Term No. 819. Chicago, Milwaukee & St. Paul Ry. Co. et al., Petitioners, vs. Des Moines Union Ry. Co. et al. Writ of certiorari and return. Filed April 4, 1919.

Supreme Court of the United States, October Term, 1918.

No. 820.

(No. 4886 in the United States Circuit Court of Appeals.)

DES MOINES UNION RAILWAY COMPANY et al., Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY et al., Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the transcript of record herein, now on file in the office of the Clerk of the Supreme Court of the United

States be taken as the return to the writ of certiorari issued in this cause under date of March 22nd, 1919.

J. L. PARRISH AND
F. W. LEHMANN,
Attorneys for Petitioners.
JOHN C. COOK,
BURTON HANSON AND
JAMES L. MINNIS,
Attorneys for Respondent.

(Endorsed:) No. 4886. Supreme Court of the United States. No. 820. October Term, 1918. Des Moines Union Railway Company et al., Petitioners, vs. Chicago, Milwaukee & St. Paul Railway Company et al., Respondents. Stipulation as to return to Writ of certiorari. Filed Apr. 1, 1919, E. E. Koch, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Des Moines Union Railway Company et al. are appellants, and Chicago, Milwaukee & St. Paul Railway Company et al. are appellees, No. 4886, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal — the District Court of the United States for the Southern District of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-second day of March, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,906. Supreme Court of the United States, No. 820, October Term, 1918. Des Moines Union Railway Company et al., vs. Chicago, Milwaukee & St. Paul Railway Company et al. Writ of certiorari. Filed Apr. 1, 1919, E. E. Koch, Clerk.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of the Des Moines Union Railway Company et al., Appellants, vs. The Chicago, Milwaukee and St. Paul Railway Company et al., No. 4886, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this second day of April, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] File No. 26,906. Supreme Court U. S. October Term, 1918. Term No. 820. Des Moines Union Ry. Co. et al., Petitioners, vs. Chicago, Milwaukee & St. Paul Ry. Co. et al. Writ of certiorari and return. Filed April 4, 1919.